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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1901~~ 1902.

No ~~211~~ 90.

ANTON MENCKE, PETITIONER,

vs.

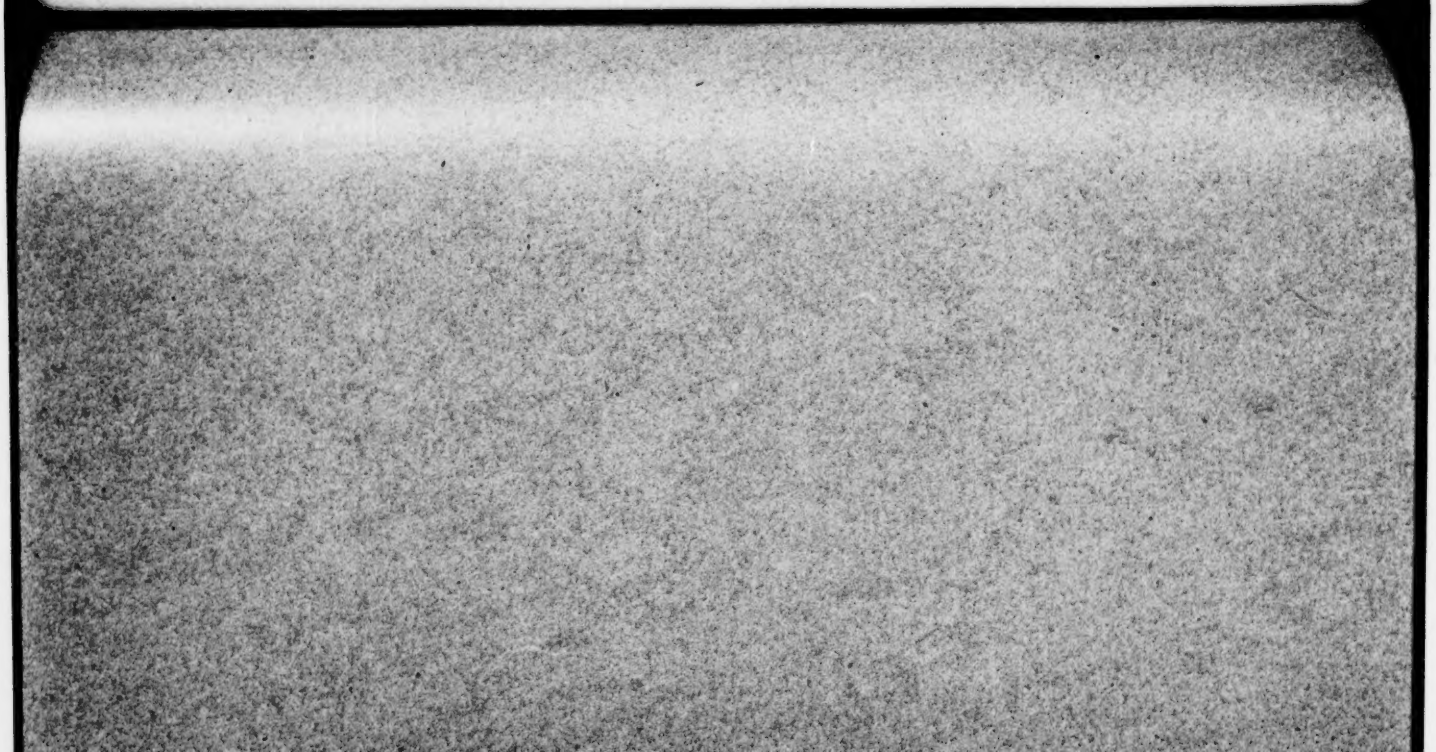
A CARGO OF JAVA SUGAR EX SHIP "BENLARIG;" JAMES N. JARVIE ET AL., CLAIMANTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 29, 1901.

CERTIORARI AND RETURN FILED MAY 20, 1901.

(18,140.)



11477

(18,140.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 11, 1902.

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1 United States District Court, Eastern District of New York.

ANTON MENCKE, Libellant,
against
A CARGO OF JAVA SUGAR EX THE BRITISH SHIP "BENLARIG;" James N. Jarvie, John Arbuckle, William V. R. Smith, and William A. Jamison, Composing the Firm of Arbuckle Brothers, Claimants.

1899.
May 27. Libel filed. No process issued. No attachment made.
June 1. Claim filed by James H. Jarvie, *et al.*, owners. Stipulation value in sum of $2,000 filed.
" 13. Amendment to libel filed.
Sept. 28. Answer and interrogatories filed.
Oct. 7. Answers to interrogatories filed.
Nov. 22. Cause tried before Hon. Edward B. Thomas, district judge.
1900.
Jan. 16. Decision rendered.
" 20. Final decree entered.
Feb. 6. Notice of appeal filed.

2 To the Honorable Edward B. Thomas, United States district judge for the eastern district of New York:

The libel of Anton Mencke, master of the British ship *Benlarig*, against a cargo of Java sugar *ex* said ship and against all persons intervening for their interest therein, in a cause of contract, civil and maritime, alleges as follows:

First. The libellant, Anton Mencke, is and was at the times hereinafter mentioned the master of the British ship *Benlarig*, and is duly authorized by the owners of said ship to prosecute this suit.

Second. On or about the first day of July, 1898, the owners of the British ship *Benlarig*, of 1692 tons register, agreed with Messrs. Erdmann & Sielcken, merchants of Java, by charter-party in writing, that the said vessel, then on her voyage from Philadelphia for Java, should with all convenient speed discharge her outward cargo in Java and receive orders for first port of loading, which were to be given when vessel was ready for stiffening, and should load from the charterers, or their agents, in Java as ordered, always afloat, a full and complete cargo of dry sugar in baskets and / or in bags, which the said charterers bound themselves to ship, and should therewith proceed as ordered to Delaware breakwater for orders to discharge at New York, Boston, Philadelphia, or Baltimore, "or so near the port of discharge as she may safely get and deliver the same, always afloat," agreeable to bills of lading, on being paid freight in full, at and after the rate of 27 shillings and 6 pence per ton of twenty hundredweight, net weight delivered at port of discharge. It was also provided that 1 shilling and 3 pence per ton net weight delivered should be deducted from the stipulated freight, if vessel was ordered direct to an American port, without calling for orders at Delaware breakwater; also

"4. All goods to be brought to and taken from alongside
3 of the ship, always afloat, at the said charterers' risk and expense, who may direct the same to the most convenient anchorage; lighterage, if any, to reach the port of destination, or deliver the cargo at the port of destination, remains for account of receivers, any custom of the port to the contrary notwithstanding."

"6. The freight to be paid without discount, on the right delivery and final weighing of the cargo. * * * If in America, in gold at the current rate of exchange, at the date of ship's entry at custom-house."

"13. * * * The owners to have an absolute lien on this cargo for all freight, dead freight and demurrage due under this charter-party."

Third. The said charter-party was in the words and figures set forth in the copy hereto annexed and marked "Schedule A," which the libellant avers to be a true copy, and for greater particularity makes it a part of this libel.

Fourth. The *Benlarig* proceeded with all convenient speed to the island of Java, pursuant to said charter-party, and there loaded for the charterers a full and complete cargo of sugar in baskets, between the 15th day of November and the 5th day of December, 1898. Four bills of lading were issued for said cargo to Messrs. Erdmann & Sieleken, the charterers, reciting the shipment of said sugar in good order and condition, to be delivered at the port of discharge, as per charter-party, dated London, 1st July, 1898, and to Messrs. Winter & Smillie, or their assigns, "they paying freight for the said sugar, as per charter-party, general average, if any, to be settled according to York-Antwerp rules, 1890, all other conditions and exceptions, negligence and Harter act clauses included as per charter-party above referred to." True copies of said four bills of lading are annexed to this libel and marked "Schedules B, C, D and E" respectively, and made a part hereof.

Fifth. Upon the completion of the loading at Java, the *Benlarig*
duly proceeded upon her voyage, and was ordered by the
4 charterers to proceed to the port of New York, where she arrived in due time, on or about the 14th day of April, 1899.

The libellant commenced to discharge said cargo of sugar on or about the 19th day of April, 1899, and finished discharging on the 2nd day of May, 1899. The libellant and said vessel duly delivered to Messrs. Arbuckle Bros., at the port of New York, in the city of Brooklyn, within this district, in accordance with the terms of said charter-party and bills of lading, all of the cargo received by the ship in Java; and it was agreed by and between the libellant and the said Arbuckle Bros. that said delivery should not be construed as any waiver of ship's lien on said cargo for freight and other charges.

Sixth. As libellant is informed by Messrs. Arbuckle Bros., the consignees and receivers of said cargo of sugar, the actual net weight of the whole of said sugar delivered to them *ex* ship *Benlarig*, as ascertained by private weighers, amounts to 2,493.42 tons, and the freight on same at the rate of exchange provided for in said charter-

party (4.86¾ per pound sterling) amounts to the sum of $5,929.52, on account of which the receivers and consignees of said sugar have only paid the sum of $4,000, leaving due and owing the sum of $1,929.52, which sum has been demanded and refused.

The libellant further avers that he has a good and valid lien for freight on said cargo of sugar for the sum of $1,929.52, in accordance with the terms of the said charter-party, bills of lading and agreement with the receivers and consignees.

Seventh. The libellant, as well as the owners of said ship and her servants and agents, have duly performed all conditions of said charter-party and bills of lading, undertaken by them to be performed, and have delivered all the sugar shipped in Java, in the same order and condition as received, and were and are entitled to freight on same as agreed. The receivers and consignees of said sugar, however, have refused, and still refuse, to pay the balance of freight due on same, amounting to $1,929.52, although repeated demands have been made therefor and due delivery of said cargo was made in accordance with the terms of the said charter-party and bills of lading.

Eighth. All and singular the premises of this libel are true, and the said cargo is within this district and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore, the libellant prays that process in due form of law may issue against the said cargo, and that the same may be condemned and sold to pay the said claim of libellant, and that all persons intervening for their interest therein may be cited to appear and answer all and singular the matters aforesaid, and for such other and further relief as he may be entitled to receive.

ANTON MENCKE.

Sworn to before me this 26th day of May, 1899.

JAMES T. KILBRETH,
Notary Public, New York County.

SCHEDULE A.

Galbraith, Pembroke & Co.
London
8, Austin Friars.

Java
Sailing

Charter-party.

LONDON, 1 *July*, 1898.

It is this day mutually agreed between Messrs. Watson Brothers of the good British ship or vessel called the *Benlarig* built in 18— classed 100 A1 till 18— which class is to be maintained during this charter of register tons 1692 now sailed Philadelphia for Java May 30th, on the one part, and Messrs. Erdmann & Sieleken, merchants of Batavia, Samarang, and Sourabaya, on the other part.

1. That the said ship being tight, staunch, and strong, and in

every way fitted to carry dry and perishable merchandise for
6 the voyage, shall with all convenient speed discharge her outward cargo in Java and receive orders for first port of loading which are to be given when vessel is ready for stiffening to load from charterers or their agents at one or two ports in north side of Java (always afloat) besides last discharging port of outward cargo as ordered within 24 hours after the master has given written or telegraphic notice to charterers or their agents, provided such notice be received before 12 o'clock a. m. that the ship has arrived and discharged outward cargo, and after having once produced a first-class certificate of seaworthiness which is to be given at last port of discharge if surveyor available if not then at first port of loading surveyor to be assigned by charterers or their agents (which captains and owners hereby engage to provide), any subsequent survey required by charterers to be paid for by them, and is at the free disposal of charterers; if orders not given within such 24 hours lay days to count, but in no case lay days to commence, or any loading port to be named, before 15 October unless with charterers' consent, charterers reserving to themselves the option of naming the second port of loading, if any, on or before clearing the ship from first or second port of loading; a full and complete cargo of dry sugar in baskets and / or in bags which the said charterers bind themselves to ship and the vessel engages to take, not exceeding what she can reasonably stow and carry over and above her tackles, apparel, provisions, and furniture, and being so loaded (and dispatched), shall (unless ordered to a direct port of discharge on signing last bills of lading) therewith proceed to Barbadoes thence to Queenstown or Falmouth (as directed by charterers or their agents) for orders, to discharge always afloat, either at a safe port in the United Kingdom or on the continent of Europe between Havre and Hamburg (both included) Rouen excluded or at option of charterers to order vessel from Barbadoes to proceed to Delaware breakwater for orders to discharge at New York, or Boston, or Philadelphia, or Baltimore, or so near the port of discharge as she may safely get, and deliver the same, always afloat, in a customary place and manner, in
7 such dock as directed by charterers, agreeably to bills of lading, on being paid freight in full of all port charges, pilotage, and primage as customary at port of discharge, at and after the rate of 27 / 6 twenty-seven shillings & sixpence per ton 20 cwt. nett weight delivered at port of discharge.

2. (8d) 1 / 3 per ton nett weight delivered is to be deducted from the stipulated rate of freight, if the vessel is ordered from Barbadoes to a European or American port of discharge as above directed without calling at channel or Delaware.

3. The necessary dunnage consisting of bamboo and / or rattans and / or sapanwood and / or canes, at charterers' option, to be furnished by said charterers as much as required by the master, and to be delivered free of freight at port of discharge. Charterers to be at liberty to ship dunnage at last port of discharge of outward cargo within 24 hours after the master's written notice to receive the same, provided such notice be received before 12 o'clock a. m., fur-

ther detention thereby, if any, to count as lay days, but such port shall not be considered a loading port unless other produce is shipped there.

4. All goods to be brought to and taken from alongside of the ship always afloat at the said charterers' risk and expense, who may direct the same to the most convenient anchorage; lighterage, if any, to reach the port of destination, or deliver the cargo at port of destination, remains for account of receivers, any custom of the port to the contrary notwithstanding.

5. The captain has no permission to load any goods from whomsoever without the consent of charterers or their agents.

6. The freight is to be paid without discount on the right delivery and final weighing of the cargo: if in the United Kingdom in cash in pounds sterling, if on the continent of Europe in cash for short sight bank bills on London at current rate of exchange for short sight bills on London, and if in America in gold at current
8 rate of exchange at the date of ship's entry at custom-house. The number of packages signed by captain in bills of lading to be binding on vessel and owners.

7. Cash for ship's disbursements, not exceeding £500 (for the due appropriation of which the said charterers shall not be responsible) to be advanced to the master by the said charterers or their agents, if required, at ports of loading, free of interest, but paying 2½ per cent. commission; such advance together with aforesaid commission and cost of assurance (which said charterers are hereby authorized to effect) and the total of which the captain is bound to give his receipt, and/or endorsement on copies of charter-party and/or bills of lading at charterers' option, to be on account of chartered freight and to be deducted on settlement thereof, at the 6 months' sight exchange for private documentary bills on London on date of clearance of the vessel. Captain's receipt or endorsement to be binding for ship and owners, shall be conclusive evidence.

8. (30) thirty working days as lay days are to be allowed to said charterers (if the ship is not sooner dispatched) for loading the said ship at port or ports of loading, and waiting for orders at port or ports of call; such working days in all ports to commence within the same time and under the same conditions as stipulated in first paragraph (1) of this charter-party, say 24 hours after the master has given written notice, and the cargo to be taken out with customary dispatch at port of discharge, and 20 running days on demurrage over and above said working days at four pence per register ton per day. Time occupied in shifting ports of loading not to count as lay days. If required by charterers the captain is bound to take additional native workmen on board at ship's expense to accelerate the loading and stowing of cargo, and to give 24 hours' notice beforehand of the quantity of cargo he requires to be shipped day by day, and to pay demurrage (if any) for boat-loads so ordered and retained alongside his ship beyond customary time. Days on which charterers are prevented from shipping off and/or sending cargo alongside, by causes over which they have no control also Sundays, custom-house and bank holidays or any other holi

days, according to the custom of the port, throughout this
9 charter, not to count as lay days.

9. The vessel to be addressed to charterers or their agents at ports of loading, paying at last loading port, one commission only of 2½ per cent. on this freight, as per nett intaken weight, counting the picul at 136 lb. English and the exchange as per 7.

10. Should the vessel, after being loaded, be compelled to return to Java or Padang or Macassar vessel is to be addressed to charterers or their agents, if charterers so desire, under customary commission terms, without consignees being obliged to provide for any funds required.

11. Should the master not be able to produce a first-class certificate of seaworthiness as required by 1 of this charter-party within a week after discharge of her outward cargo, or should the vessel not have arrived, discharged her outward cargo, if any, and have produced such certificate of seaworthiness, and be at the free disposal of charterers or their agents, on or before noon of the 15 December, 1898, the latter to have the option of cancelling or maintaining this charter-party.

12. If the vessel touches at any port on her way to Java, the captain or owner is bound to write (provided he has been timely informed of this charter) to charterers at Batavia or London by first opportunity after her arrival at such a port, advising them when he will probably leave that port for Java. The captain is bound to report to charterers' agents or to the consignees of the cargo in the United Kingdom, or on the continent or America, the vessel's arrival at port of call, and also the state of the cargo as far as he can judge, and to wait for their or*drs*, provided the names of such agents or consignees are given to the captain at the last loading port or port of call. General average, if any, to be settled according to York-Antwerp rules, 1890.

13. The said charterers or their agents are to have the privilege of transferring this charter to others (guaranteeing the due fulfillment of this charter), or of underletting the whole or part of
10 this vessel, and the master is to sign clean bills of lading at charterers' or their agents' office as required, and presented by them for whole or portions of cargo at any rate of freight without prejudice to this charter-party, but in the event of the bills of lading rates of freight being lower than the chartered rate, the difference arising is to be paid to the master in cash before vessel is sailing from final port of loading, for as much as such difference is not balanced by higher rates in other bills of lading, or covered by the amount advanced to the master for ship's disbursement, including insurance and all commissions allowed under this charter. The owners to have an absolute lien on this cargo for all freight, dead freight and demurrage due under this charter-party. The liability of the charterers under this charter-party shall wholly cease after shipment of the cargo.

14. Penalty for non-performance of this agreement or non-fulfilling all conditions of the charter-party must be paid by the party

delinquent to the party willing to observe at the rate of estimated freight in cash on demand.

In witness whereof a number of copies of the same tenor and date have been attested, one of which being accomplished, the others to stand void.

If last outward port of discharge be Samarang or Sourabaya charterers bind themselves to load sufficient stiffening of sugar there to enable ship to proceed to first port of loading.

C. S., June, 1897.

p. p. WATSON BROS.
T BROWNLIE.

(S.)

p. pro ERDMANN & SIELCKEN.
(S.) CARL SCHULTZE.

4. 7. 98.

On the left margin there appears the following:

A true copy of the original stamped charter-party in our possession.

GALBRAITH, PEMBROKE & CO.

Also:

11 15. If the vessel is ordered to and discharge at a port in the United States the shipment to be subject there to all the terms and provisions of, and to all the exceptions from liability contained in, the act of Congress of the United States relating to navigation, &c., approved on the 13th day of February, 1893. (16 omitted.)

17. The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, assailing thieves, arrest and restraint of princes, rulers and people, collissions, stranding, and other accidents of navigation excepted, even when occasioned by the negligence, default, or error in judgment of pilots, masters, mariners, or other servants of the ship-owner.

Endorsements on back of charter-party:

"*Ben Lavrig*" *charter-party. Java* to *Barbadoes* for *orders* to a *port of call* in *U. States* or *U. K.* for *orders* to *port of discharge.* 1st July, 1898.

7 say seven lay days have been used in this port.

Dasjoen the 15th November 1898.

A. MENCKE, *Master.*

(Name illegible.)
Agent to Messrs. Erdmann & Sielcken.

10 say ten *lay days* have been used at this port for taking in the balance of a full and complete cargo.

Samarang, December 5 / 1898.

(Name illegible.)
A. MENCKE, *Master.*

12 SCHEDULE B.

Master's copy.

Head contra :

Marks.	Number.	Baskets.	Piculs.	
L A A	1–1605	1605	8096	32
A A A	1–1007	1007	5138	70
N A A	1– 64	64	333	45
		2676	13568	47

SHIPPED, in good order and condition, by ERDMANN & SIELCKEN on board the British sailing vessel called the "BENLARIG," whereof A. Mencke is master, now lying at the roads of Dasoen and bound for port or ports for orders as per charter-party To say 2676 baskets of sugar weighing nett pics. 13568,47 say two thousand six hundred seventy-six baskets of sugar, weighing nett thirteen thousand five hundred sixty-eight piculs and forty-seven catties being marked and numbered as in the margin, and are to be delivered in the like order and condition at the port of discharge as per charter-party dated London 1st July 1898 (the dangers of the seas excepted) unto Messrs. Winter & Smillie as agents or to their assigns, he or they paying freight for the said SUGAR as per charter-party. General average, if any, to be settled according to York/Antwerp rules 1890 all other conditions and exceptions, negligence and Harter act clauses included, as per charter-party above referred to with average accustomed. In witness whereof the master or purser of the said vessel has affirmed to three bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in Dassoen the 15th day of November 1898.

Weight and contents unknown to

(Sig. of master.)

All baskets bear the mark "Java."

SCHEDULE C.

Owner's copy.

SHIPPED, in good order and condition by ERDMANN & SIELCKEN on board the British sailing vessel called the "BENLARIG," whereof A. Mencke is master, now lying at the roads of Bassoen and bound for port or ports for orders as per charty-party to say 2676 baskets of sugar, weighing net pics. 13568,47. Say two thousand six hundred seventy-six baskets of sugar, weighing nett thirteen thousand five hundred sixty-eight piculas and forty-seven catties being marked and numbered as in the margin, and are to be delivered in the like order and condition at the port of discharge as per charter-party dated London 1st of July 1898 (the dangers of the seas excepted), unto Messrs. Winter & Smillie, as agents, or to their assigns, he or they paying freight for the said SUGAR as per charter-party. General average, if any, to be settled according to York-Antwerp rules 1900. All other conditions and exceptions, negligence and Harter act clauses, included, as per charter-party above referred to with average accustomed. In witness whereof the master or purser of the said vessel has affirmed to three bills of lading, all of this tenor and date, one of which being accomplished, the others, to stand void.

Dated in Dassoen the 15th day of November 1898.

Weight and contents unknown to

A. MENCKE, *Master.*

lead contra:

Marks.	Numbers.	Baskets.	Piculs.	
A A	1–1605	1605	8096	32
A A	1–1007	1007	5138	70
A A	1– 64	64	333	45
		2676	13568	47

All baskets bear the mark "Java."

14 SCHEDULE D.

SHIPPED, in good order and condition by ERDMANN & SIELCKEN on board the British sailing vessel called the "BENLARIG," whereof A. Mencke is master, now lying at the roads of SAMARANG, and bound for Barbadoes and another port for orders to say 3114 baskets of sugar weighing nett pics. 17004,27 say three thousand one hundred and fourteen baskets of sugar, weighing nett seventeen thousand and four piculs and twenty-seven catties being marked and numbered as in the margin, and are to be delivered in the like order and condition at the port of discharge as per charter-party, dated London 1st July 1898 (the dangers of the seas excepted) unto Messrs. Winter & Smillie, as agents or to their assigns, he or they paying freight for the said SUGAR as per charter-party. General average, if any, to be settled according to York-Antwerp rules, 1890. All other conditions and exceptions, negligence and Harter act clauses included, as per charter-party above referred to with average accustomed. In witness whereof the master or purser of the said vessel has affirmed to three bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in SAMARANG, the third day of December, 1898.

Weight and contents unknown to ——— ———.

CAPTAIN'S COPY.

Head contra:

Marks.	Numbers.	Baskets.	Piculs.	
K K K	1–122	122	595	86
J J J	1–545	545	2606	37
L L L	1 731	731	3959	17
D D D	1–470	470	2408	42
S S S	1–716	716	4136	59
U U U	1383–1412	30	159	97
W W W	1–500	500	2833	89
		3114	17004	27

All baskets bear the mark "Java."

15

SCHEDULE E.

Duplicate.

SHIPPED, in good order and condition, by ERDMANN & SIELCKEN, on board the British sailing vessel called the "BENLARIG," whereof A. Mencke is master, now lying at the roads of SAMARANG, and bound for Barbadoes and another port for orders to say 1958 baskets of sugar weighing nett pics. 11074,30 say one thousand nine hundred and fifty-eight baskets of sugar weighing nett eleven thousand and seventy-four piculs and thirty catties being marked and numbered as in the margin, and are to be delivered in the like order and condition at the port of discharge as per charter-party dated London 1st July 1898 (the dangers of the seas excepted) unto Messrs. Winter & Smillie as agents or to their assigns, he or they paying freight for the said SUGAR as per charter-party. General average, if any, to be settled according to York / Antwerp rules 1890. All other conditions and exceptions, negligence and Harter act clauses included, as per charter-party above referred to with average accustomed. In witness whereof the master or purser of the said vessel has affirmed to three bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in SAMARANG, the fifth day of December 1898.

Weight and contents unknown to

——— ———.

Duplicate

CAPTAIN'S COPY.

Head content:

Marks.	Numbers.	Baskets.	Piculs.	
C C C	1-301	301	1694	64
H H H	1-589	598	3611	68
X X X	183-414	232	1118	48
X X X	1-136 / 220-372	289	1623	32
Y X Y	1-583	538	3026	18
		1958	11074	30

Endorsed: Libel, Filed May 27, 1899.

16 United States District Court, Eastern District of New York.

ANTON MENCKE, Master of the British Ship "Benlarig,"
against
A CARGO OF JAVA SUGAR EX SAID SHIP, Delivered to Arbuckle Brothers.

And now comes Anton Mencke, the libellant, and amends his libel herein as follows:

First. By striking out the fifth article of said libel and substituting therefor the following:

"Fifth. Upon the completion of the loading at Java the *Benlarig* duly proceeded upon her voyage, and was ordered by the charterers to proceed to the port of New York, where she arrived in due time, on or about the 14th day of April, 1899.

"Before or about the time of the arrival of the *Benlarig* at the port of New York, the said cargo of sugar which is the subject of this suit was duly sold and transferred, together with the bills of lading issued therefor, by the owners and consignees thereof to the firm of Arbuckle Brothers, sugar refiners, in the port of New York; and said Arbuckle Brothers were the owners of said sugar at the time of the delivery of same, and took delivery of said sugar and paid to the libellant a part of the freight thereon.

"The libellant commenced to discharge said cargo of sugar on or about the 19th day of April, 1899, and finished discharging on the second day of May, 1899. The libellant and said vessel duly delivered to Messrs. Arbuckle Bros. at the port of New York, in the city of Brooklyn, within this district, in accordance with the
17 terms of said charter-party and bills of lading, all of the cargo received by the ship in Java; and it was agreed by and between the libellant and the said Arbuckle Bros., that said delivery should not be construed as any waiver of the ship's lien on said cargo for freight and other charges."

CONVERS & KIRLIN,
Proctors for Libellant.

CITY AND COUNTY OF NEW YORK, } ss:
Southern District of New York, }

J. Parker Kirlin, being duly sworn, deposes and says that he is one of the proctors for the libellant herein and that the foregoing amendment is true to the best of his knowledge, information and belief, derived from statements made by the libellant and his agents; that the reason this verification is not made by libellant is that he is not now within the United States or one hundred miles of the place of trial.

J. P. KIRLIN.

Sworn to before me this 11th day of July 1899.

JAMES T. KILBRETH,
[SEAL.] *Notary Public, New York County.*

(Endorsed:) Amendment to libel.—Filed, July 13, 1899.

18 To the Honorable Edward B. Thomas, district judge of the United States for the eastern district of New York:

John Arbuckle, William V. R. Smith, James N. Jarvis and William A. Jamison, copartners, trading under the name and style of Arbuckle Brothers, intervening for their interest, as owners of a cargo of Java sugar *ex* British ship *Benlarig*, as the same is proceeded against in this court upon the libel of Anton Mencke, master of said ship, answer the same as follows:

First. The claimants are copartners, doing business in the city of New York, and have heretofore, to wit, on the 1st day of June, 1899, duly intervened herein, and filed their claim to the above-named cargo of sugar, as owners thereof.

Second. The claimants admit the matters alleged in article first of the libel herein.

Third. The claimants admit the execution of a charter-party between the owners of the ship *Benlarig* and Messrs. Erdmann & Sieleken on or about July 1st, 1898, as alleged in article second of the libel; but they deny that the terms of said charter-party are fairly or substantially set forth in said article. They allege that the ship *Benlarig* was required by said charter-party,

"to discharge at New York, or Boston, or Philadelphia or Balti-
"more, or so near the port of discharge as she may safely get, and
"deliver the same, always afloat, in a customary place and manner,
"in such dock as directed by charterers."

For greater certainty as to the terms and conditions of said charter-party, the claimants require that the same may be produced and proved.

Fourth. The claimants admit that the *Benlarig* duly proceeded to the island of Java, and there loaded a cargo of sugar, for
19 which bills of lading were issued to the charterers, substantially as alleged in article fourth of the libel; but for greater certainty as to the conditions and recitals contained in said bills of lading, the claimants require their production and proof.

Fifth. That claimants allege that the said vessel made delivery of said cargo of sugar into lighters at West Central pier, Atlantic docks, with the consent of the claimants but subject to the reservations, conditions and agreements, hereinafter set forth. The claimants deny that the libellant and said vessel duly delivered said cargo, or any of it, in accordance with the terms of said charter-party and bills of lading.

They admit the other matters alleged in article fifth of the libel and in the amendment thereof.

Sixth. The claimants admit that the net weight of said cargo amounts, according to private weighers, to 2,493.42 tons, and that the freight on said cargo, according to the charter-party, amounts to the sum of $15,929.52. They deny that the sum of $14,000 has only been paid on account thereof, but allege that the sum of $14,463.40 has been so paid. The claimants admit the sum of $1,929.52 has been demanded by the libellant and refused, but they

deny all and singular the other matters alleged in article sixth of the libel herein, not hereinbefore in this article expressly admitted.

Seventh. The claimants admit the jurisdiction of this court, and that all of the sugar shipped in Java has been delivered. They deny all and singular the other matters alleged in articles seventh and eighth of the libel herein other than those hereinbefore expressly admitted.

Eighth. Further answering the libel herein, and for a separate and distinct defence thereto, the claimants allege that by and under the charter-party aforesaid, it was provided that the ship *Beulah* should, if so ordered by the charterers, proceed to and discharge at New York, or so near thereto as she could safely get, and should deliver her cargo always afloat, in a customary place and manner, and in such dock as directed by charterers.

20 Said vessel was duly ordered by said charterers to proceed to the port of New York, and did so proceed and safely reached said port. Said vessel was thereupon duly and seasonably directed to discharge at the dock adjacent to the claimants' refinery at the foot of Pearl street, in the borough of Brooklyn, in said port.

The claimants aver that said vessel could safely reach the port of New York, and each and every part thereof, including the dock aforesaid, and could deliver her cargo at said dock, always afloat, and that said dock was and is a customary place to discharge said cargo; but the libellant neglected and refused to abide by the stipulation aforesaid of said charter-party and to discharge said cargo in said dock, as directed.

Ninth. The claimants further allege that subsequent to the refusal aforesaid, they designated the West Central pier, Atlantic dock, as a place for the discharge of said cargo, under the distinct understanding and agreement that said discharge should be without prejudice to the claimants' right to recover from the libellant such damage and loss as might be sustained by them, by reason of the libellant's refusal to proceed to and discharge at the claimants' refinery, as aforesaid.

Tenth. By reason of the premises the claimants were compelled at their own cost and expense to complete the transportation of said cargo of sugar to its original destination, to wit, to the dock adjoining their refinery, to their loss and damage in the sum of $1,466.12.

Wherefore the claimants pray that they may be permitted to recoup their said loss of $1,466.12 against the demand made in the libel herein, and that the libellant may be required to answer upon oath the interrogatories hereto annexed, and that the court may be pleased to pronounce against the libel aforesaid and to condemn the libellant in costs, and that the claimants may have such other and further relief in the premises as they may be entitled to receive.

JAMES N. JARVIE.

21 Sworn to before me this 25th day of September, 1899.
FREDERICK M. BROWN,
Notary Public, Kings County.

Certificate filed in New York county.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for Claimants.

Interrogatories Annexed to the Answer, which the Libellant is Required to Answer in Writing upon Oath.

First interrogatory. Is it not a fact that on or about the 26th day of May, 1899, the sum of $463.40 was paid to the libellant or his agents, on account of freight upon the cargo mentioned in the libel, in addition to the sum of $14,000, as alleged in article sixth of said libel?

Second interrogatory. Is it not a fact that the delivery of said cargo at West Central pier, Atlantic docks, was without prejudice to claimants' right to recover any damages by them sustained, by reason of the delivery of said cargo at said dock, instead of at claimants' refinery?

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for Claimants.

(Endorsed:) Answer and interrogatories.—Filed September 28, 1899.

22 United States District Court, Eastern District of New York.

ANTON MENCKE, Libellant,
against
A CARGO OF SUGAR EX "BENLARIG."

The libellant answers the interrogatories addressed to him at the close of the claimants' answer as follows:

To the first interrogatory he saith: No, but that amount was received on or about June 6th, 1899.

To the second interrogatory he saith: That the delivery of the said cargo at West Central pier, Atlantic docks, was made without prejudice to the rights of either party under the charter, and upon the agreement that the libellant's lien on the cargo for any balance of freight or charges under the charter-party, was reserved and deemed to continue; and that the claimants' right to recover any damages by them sustained by reason of the delivery of the said cargo at said dock, instead of at the claimants' refinery, should be reserved if the ship under the charter-party was bound to make delivery at said refinery.

CONVERS & KIRLIN,
Proctors for the Libellant.

SOUTHERN DISTRICT OF NEW YORK, } ss:
County of New York, }

J. Parker Kirlin, being duly sworn, says that he is one of the proctors for the libellant herein and that the foregoing
23 answers are true according to the best of his knowledge, information and belief derived from an examination of the charter-party and the correspondence between the parties and from information derived from the libellant and his agents at New York.

He further says that the reason why these answers to interrogatories are not verified by the libellant is that the said libellant is absent at sea.

J. PARKER KIRLIN.

Sworn to before me this 6th day of October, 1899.
JAMES T. KILBRETH,
Notary Public, New York County.

(Endorsed:) Answers to interrogatories, addressed to Anton Mencke.—Filed, October 7th, 1899.

24 United States District Court, Eastern District of New York.

ANTON MENCKE
vs.
A CARGO OF SUGAR EX BRITISH SHIP "Benlarig." } Before Hon. Edward B. Thomas, Judge.

BROOKLYN, N. Y., *November* 22, 1899.

Appearances.

Messrs. Convers & Kirlin (Mr. Kirlin), for libellant.
Messrs. Butler, Notman, Joline & Mynderse (Mr. Brown), for respondent.
Mr. Convers reads libel.
Mr. Brown reads answer.

Counsel for libellant reads deposition of ANTON MENCKE, taken on behalf of libellant, as follows:

Q. Captain, how long have you been going to sea?
A. I have been to sea now for twenty-nine years.
Q. To what nation do you belong?
A. I was born in Germany.
Q. Are you the captain of the *Benlarig?*
A. Yes.
Q. Is that a British vessel?
A. Yes.
Q. You are bringing this libel for the balance of freight yourself, are you?
A. Yes.

Q. In behalf of the owners?
A. Yes.
Q. You have been instructed to do so?
A. Yes.
25 Q. Who are the owners?
A. Watson Brothers, Glasgow.
Q. How long is it since you arrived in New York on this present voyage?
A. I think I arrived in New York on the 28th, on a Friday morning—I think on the 28th.
Q. Of April?
A. Of April.
Q. Were you chartered for this voyage?
A. I was chartered during the running time from Philadelphia to Java.
Q. What was your voyage?
A. From Java to Barbadoes for orders.
Q. And thence to New York?
A. Thence to New York.
Q. Have you the cable that you received at Barbadoes?
A. Yes.
Q. (Paper shown witness.) Is this it?
A. Yes.

Said cable offered in evidence and marked Libellant's Exhibit 1, May 26, 1899.
Libellant's Exhibit 1 reads as follows:

"West India and Panama Telegraph Company, Limited.

Bdos
From
Winter

Station 28

3
To
Ship
Benlarig
Barbadoes

9

Proceed
New York
New York 27th."

Q. (Charter-party shown witness.) Is this the charter-party under which you made the voyage?
A. That is the charter-party.
Q. The endorsements by the charterers on the back?
A. On the back, yes.

Charter-party offered in evidence, and marked Libellant's Exhibit 2, May 26, 1899.

Q. (Bills of lading shown witness.) Are these the copies of
26 the bills of lading that you issued under the charter-party?
A. Yes, of the same bills of lading.
Q. Four of them?
A. Four of them.

Bills of lading offered in evidence, and marked respectively Libellant's Exhibits 3, 4, 5 and 6, May 26th, 1899.

Libellant's Exhibit 3 is as follows:

(Master's copy.)

"Shipped, in good order and condition by Erdmann & Sielcken on board the British sailing vessel called the *Benlarig*, whereof A. Mencke is master, now lying at the roads of Dasoen and bound for port or ports for orders as per charter-party, to say:

2676 baskets of sugar weiging nett. pics. 13568.47 say two thousand six hundred seventy-six baskets of sugar weighing nett thirteen thousand five hundred sixty-eight piculs and forty-seven catties—being marked and numbered as in the margin, and are to be delivered in the like order and condition at the port of discharge as per charter-party dated London, 1st July, 1898 (the dangers of the seas excepted) unto Messrs. Winter & Smillie as agents or to their assigns, he or they paying freight for the said sugar as per charter-party. General average, if any, to be settled according to York-Antwerp rules 1890, all other conditions and exceptions, negligence and Harter act clauses, included, as per charter-party above referred to, with average accustomed. In witness whereof the master or purser of the said vessel has affirmed to three bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in Dassoen the 15th day of November, 1898.

Weight and contents unknown to

(Sig. of master.)

27

Head.	Contra. Marks.	Numbers.	Baskets.	Piculs.
L	AA	1–1605	1605	8096.32
A	AA	1–1007	1007	5138.70
N	AA	1– 64	64	333.45
			2676	13568.47

All caskets bear the mark 'Java.'"

Libellant's Exhibit 4 is as follows:

"Owner's copy.

Shipped, in good order and condition by Erdmann & Sielcken on board the British sailing vessel called the *Benlarig*, whereof A. Mencke is master, now lying at the roads of Dassoen and bound for port or ports for orders as per charter-party, to say

2,676 baskets of sugar weighing nett pics.: 13,568.47 say two thousand six hundred seventy-six baskets of sugar, weighing nett thirteen thousand five hundred sixty-eight piculs and forty-seven catties, being marked and numbered as in the margin, and are to be delivered in the like order and condition at the port of discharge

as per charter-party dated London 1st July 1898 (the dangers of the seas excepted) unto Messrs. Winter & Smillie as agents or to their assigns, he or they paying freight for the said sugar as per charter-party. General average, if any, to be settled according to York Antwerp rules 1890. All other conditions and exceptions, negligence and Harter act clauses, included, as per charter-party above referred to: with average accustomed. In witness whereof the master or purser of the said vessel has affirmed to three bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in Dassoen the 15th day of November, 1898.

Weight and contents unknown to

A. MENCKE, *Master.*

28

Head.	Marks.	Contra. Numbers.	Baskets.	Piculs.
L	AA	1–1605	1605	8096.32
A	AA	1–1007	1007	5138.70
N	AA	1– 64	64	333.45
			2676	13568.47

All baskets bear the mark 'Java.'"

Libellant's Exhibit 5 is as follows:

"Shipped, in good order and condition by Erdmann & Sielcken on board the British sailing vessel called the *Boularig* whereof A. Mencke is master, now lying at the roads of Samarang, and bound for Barbadoes and another port for orders to say

3114 baskets of sugar weighing nett pics. 17,004.27 say three thousand one hundred and fourteen baskets of sugar weighing nett seventeen thousand and four piculs and twenty-seven catties, being marked and numbered as in the margin, and are to be delivered in the like order and condition at the port of discharge as per charter-party dated London 1st July 1898 (the dangers of the seas excepted) unto Messrs. Winter & Smillie as agents or to their assigns, he or they paying freight for the said sugar as per charter-party. General average, if any, to be settled according to York Antwerp rules 1890. All other conditions and exceptions, negligence and Harter act clauses included, as per charter-party above referred to, with average accustomed. In witness whereof the master or purser of the said vessel has affirmed to three bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in Samarang, the third day of December, 1898.

Weight and contents unknown to

——.

Captain's copy.

29

Head.	Marks.	Contra. Numbers.	Baskets.	Piculs.
KK	K	1–122	122	599.86
JJ	J	1–545	545	2906.37
LL	L	1–731	731	3959.17
DD	D	1–470	470	2408.42
SS	S	1–716	716	4136.59
UU	U	1383–1412	30	159.97
WW	W	1–500	500	2833.89
			3114	17004.27

All cackets bear the mark 'Java.'"

Libellant's Exhibit 6 is as follows:

"Duplicate.

Shipped, in good order and condition by Erdmann & Sielcken on board the British sailing vessel called the *Benlarig*, whereof A. Mencke is master, now lying at the roads of Samarang, and bound for Barbadoes and another port for orders, to say

1958 baskets of sugar weighing nett pics. 11074.30 say one thousand nine hundred and fifty-eight baskets of sugar, weighing nett eleven thousand and seventy-four piculs and thirty catties, being marked and numbered as in the margin, and are to be delivered in the like order and condition at the port of discharge as per charter-party dated London 1st July 1898 (the dangers of the seas excepted) unto Messrs. Winter & Smillie as agents or to their assigns, he or they paying freight for the said sugar as per charter-party. General average, if any, to be settled according to York/Antwerp rules 1890. All other condit-ons and exceptions, negligence and Harter act clauses included, as per charter-party above referred to, with average accustomed. In witness whereof the master or purser of the said vessel has affirmed to three bills of lading all of this tenor and date, one of which being accomplished, the others to stand void.

30 Dated in Samarang, the fifth day of December, 1898.

Weight and contents unknown to

——— ———.

Duplicate.
Captain's copy.

Head.	Marks.	Contra. Numbers.	Baskets.	Piculs.
CC	C	1–301	301	1694.64
HH	H	1–598	598	3611.68
NN	N	183–414	232	1118.48
XX	X	1–136) 220–372)	289	1623.32
YY	Y	1–538	538	3026.18
			1958	11074.30

All cackets bear the mark 'Java.'"

Q. What was your cargo?
A. Sugar.
Q. In bags or baskets?
A. In baskets.
Q. Have you delivered it?
A. Yes, I delivered it all.
Q. Where was it delivered?
A. At the West Central pier, Atlantic docks.
Q. When you first arrived were you ordered to deliver the cargo at the Arbuckle refinery?
A. Yes.
Q. That is above the bridge?
A. Above the bridge.
Q. (Paper shown witness.) Is this the orders?
A. Yes, this is the orders.

Said paper is offered in evidence, and marked Libellant's Exhibit 7, May 26, 1899.

31 "Arbuckle Brothers, Old Slip and Water street; sugar department.

NEW YORK, *April* 15, 1899.

Messrs. Peter Wright & Sons, agents, *Benlarig* from Java.

DEAR SIRS: Please order this vessel discharged at our refinery, foot of Pearl street, Brooklyn, on Monday.

Yours very truly, ARBUCKLE BROTHERS,
Per JOHN GILMOUR.

J. G."

(Stamped in red ink: "Received Apr. 15, 1899. Answered.")

Q. Prior to that had your agents given notice that the ship was ready?
A. To discharge the cargo, yes.
Q. And that notice was given to Messrs. Czarnikow, Macdougall & Co., was it?
A. Yes.
Q. Who were they?
A. They were sugar people.
Q. Were they holders of the documents at that time?
A. Yes, as far as I know; yes.
Q. (Paper shown witness.) And is this the reply they made?
A. Yes.
Q. That is, they referred you to the Arbuckles, did they?
A. Yes.

Said letter from Czarnikow, Macdougall & Co., Ltd., to Messrs. Peter Wright & Sons, dated New York, April 15, 1899, is offered in evidence, and marked Libellant's Exhibit 8, May 26, 1899.

Said Libellant's Exhibit 8 is as follows:

32 Czarnikow, Macdougall & Co., New York.
Limited. & London.

(Address cables Czarnikow, New York.)

C. Czarnikow, London.
Czarnikow & Co., Glasgow.
Czarnikow & Co., Greenock.
Czarnikow Co., Liverpool. Tmsl.

112 WALL STREET, NEW YORK, *April* 15/99.

Messrs. Peter Wright & Sons, city.

DEAR SIRS: With reference to your memorandum of even date addressed to Messrs. Winter & Smillie regarding the British ship *Benlarig*, we beg to refer you to Messrs. Arbuckle Bros., who hold the documents of this cargo.

Yours truly,
CZARNIKOW, MACDOUGALL & CO. LTD.
THOS. M. SIMISTER."

Q. On the same date did your agents write this letter?
A. (Paper shown witness.) Yes.

Letter from Peter Wright & Sons to Arbuckle Brothers, dated April 15, 1899, is offered in evidence, and marked Libellant's Exhibit 9, May 26, 1899.

Said Libellant's Exhibit 9 is as follows:

"(Copy.)

APRIL 15TH, 1899.

Messrs. Arbuckle Bros., New York.

DEAR SIRS:

British S/S *Benlarig*.

This vessel arrived yesterday with a cargo of sugar from Java, via Barbadoes, and is entered at the custom-house. Messrs.
33 Czarnikow, MacDougal & Co., have referred us to you for orders for discharging berth, which we should be pleased to have as early as possible.

We might mention that one of this vessel's masts, being in one piece, will not admit of her going under the Brooklyn bridge.

Yours truly,
(S'g'd) PETER WRIGHT & SONS.
E. D. SCHOEFER."

Q. (Paper shown witness.) Did your agents also receive this further letter from Messrs. Arbuckle on the same date?
A. Yes.

Said letter, from Arbuckle Brothers to Peter Wright & Sons, dated April 15, 1899, is offered in evidence, and marked Libellant's Exhibit 10, May 26, 1899.

Said Libellant's Exhibit 10 is as follows:

"Arbuckle Brothers, Old Slip and Water street; sugar department.

NEW YORK, *April* 15, 1899.

Messrs. Peter Wright & Sons, New York city.

GENTLEMEN: The bearer, Mr. Trecartin, is the stevedore at our refinery, and does our work on all vessels coming to our consignment.

As it is quite *possible* that the cargo may have to be delivered in lighters alongside of ship, provided no arrangement can be made to have the vessel go above the bridge, we would like Mr. Trecartin to do the work on this ship, and we feel that he would look after our interests better than any other outside stevedore.

As regards the question of lightering the sugars, we are in communication with London on the subject, and will let you know the result as soon as possible.

Yours very truly,

ARBUCKLE BROTHERS,
Per JOHN GILMOUR.

J. G."

(Stamped in red ink "Received Apr. 15, 1899. Answered.")

34 Q. (Paper shown witness.) And did your agents also write a further letter on the same date to the Messrs. Arbuckle?

A. Yes, that is right.

Said letter from Peter Wright & Sons to Arbuckle Brothers, dated April 15, 1899, is offered in evidence and is marked Libellant's Exhibit 11, May 26, 1899.

Said Libellant's Exhibit 11 is as follows:

"(Copy.)

APRIL 15TH, 1899.

Messrs. Arbuckle Bros., New York.

British ship *Benlarig*.

DEAR SIRS: We are in receipt of your note of today ordering the above vessel to discharge at the foot of Pearl street, Brooklyn, and beg to repeat what we advised this morning, that it is impossible for her to pass under the Brooklyn bridge. We will have to ask you to order the vessel to another berth to which she can proceed; any delay in receiving orders, to be for account of receivers, as customary.

In answer to your second communication of today referring to the question of stevedoring, we would say that Mr. Trecartin would be

perfectly satisfactory to us were it not for the fact that the owners have a yearly contract with the New York Stevedoring Co. for discharging their vessels at the port of New York, which contract, of course, will have to be carried out.

Awaiting your further orders for discharging berth, we are

Yours truly,

(S'g'd) PETER WRIGHT & SONS."

Q. And did your agents receive this letter from the Messrs. Arbuckle, dated the 18th of April? (Paper shown witness.)

A. Yes.

35 Said letter from Arbuckle Brothers to Peter Wright & Sons, dated April 18, 1899, is offered in evidence and marked Libellant's Exhibit 12, May 26, 1899.

Said Libellant's Exhibit 12 is as follows:

"Arbuckle Brothers, Old Slip and Water street; sugar department.

NEW YORK, *April* 18, 1899.

Messrs. Peter Wright & Sons, Morris building, Broad street, New York city.

British ship *Benlarig.*

GENTLEMEN: We are in receipt of your favor of even date, with reference to discharging berth for this ship, and, as requested by you, we beg to hand you herewith an order to place the vessel on the west side of West Central pier, Atlantic docks, where, as requested by you, we will send lighters to take the sugars from the vessel to our refinery.

We do this in order to save any further delay in discharging vessel, but we beg to distinctly *to* advise you that this action of ours does in no way prejudice our position as regards liability for the lighterage expenses of the cargo, which we claim, under the charter-party, is payable by the ship and her owners. The question as to the parties liable for expenses of lighterage can be settled later, but we distinctly disclaim all liability.

Kindly acknowledge receipt.

Yours very truly, ARBUCKLE BROTHERS,
Per JOHN GILMOUR.

J. G."

Q. (Paper shown witness.) And on that date did they write this letter to Arbuckle Brothers?

A. Yes.

Said letter from Peter Wright & Sons to Arbuckle Brothers, dated April 18, 1899, is offered in evidence and marked Libellant's Exhibit 13, May 26, 1899.

36 Said Libellant's Exhibit 13 reads as follows:

(Copy.)

"APRIL 18TH, 1899.

Messrs. Arbuckle Bros., New York.

DEAR SIRS:

British ship '*Benlarig.*'

Referring to your letter of the 15th inst. in reference to discharging berth for the above ship, we regret to state, as advised therein, that the ship is unable to proceed to dock at which you have ordered the vessel to discharge, on account of her being unable to pass under the Brooklyn bridge, the vessel having steel masts, all in one piece. We will, therefore, again ask you to give us another discharging berth. Failing this the cargo will have to be discharged at some safe point below the bridge and lightered to the dock designated by you.

If this be your determination, please name the point and send the lighter. We shall look to you and the cargo to pay lighterage in accordance with clause No. 4 of the charter-party.

We trust to have this question of law between us settled without delaying discharge.

Yours very truly,

(S'g'd) PETER WRIGHT & SONS,

Agents for Owners of the Br. Ship Benlarig."

Q. Did you see all of this correspondence as it passed?

A. Yes; and they kept me——

Q. And they kept you advised?

A. Kept me advised; told me all the time about this.

Q. (Paper shown witness.) And did you subsequently get this memorandum ordering you to the Atlantic docks?

A. To the Atlantic docks, yes.

Said letter from Arbuckle Brothers to captain S/S *Benlarig*, Mess. Peter Wright & Sons, ag'ts, dated April 17, 1899, is offered in evidence, and marked Libellant's Exhibit 14, May 26, 1899.

37 Said Libellant's Exhibit 14 is as follows:

"NEW YORK, *Apr. 17th*, 1899.

Captain S. S. *Benlarig*, Mess. Peter Wright & Sons, ag'ts.

DEAR SIR: Please place your vessel west side of West Central pier Atlantic dock, at the Pintas stores.
to discharge. outside.

And oblige ,

Yours very truly, ARBUCKLE BROS.

J. G."

Q. Have you a plan of the *Benlarig?*

A. Yes. I brought it up here.

Q. (A plan shown witness.) Is this it?

A. That is the one.

Q. Can you leave it here?

A. I didn't care to leave it here, because I have to make some sails at sea and I have to cut those sails on the plan. I have got another plan I may be able to leave here; it is a plan drawn from this, but *this* shows the sails—I generally make my sails from this plan.

Q. How long have you been with the *Benlarig?*

A. I have been in the *Benlarig* about seven years.

Q. Was this plan there when you went there?

A. Yes. I have been seven years on her, and three times in New York with her, and this is the third time now.

Q. You have had this plan always on the ship?

A. Always on the ship.

Q. Do you know whether it is correct or not?

A. I know it is correct, because I have cut sails on this plan.

Q. How often have you measured the heights of the mast?

A. I have measured the heights of the mast twice before—seven years ago—six years ago; and now here.

38 Q. Have you verified the plan in that way?

A. Yes. The plan is correct.

Said plan is offered in evidence, and marked Libellant's Exhibit 15, May 26, 1899.

Q. Do you think you can leave the plan with us?

A. I will see. I will give you another plan; I have got another plan—the reckoning is all there, but not the sails; and I might be able to leave it.

Q. Bring that up, and we may make some agreement. Otherwise we will get some blue prints.

A. Otherwise I will leave this, if it is needed.

Q. When did you measure the height of the masts last?

A. Yesterday.

Q. Who helped you?

A. The mate.

Q. What was his name?

A. Bentz.

Q. What did he do?

A. He measured them with a tapeline.

Q. What did Mr. Bentz do?

A. He measured one that is up aloft.

Q. Which one?

A. The bosun and Mr. Bentz and I—one.

Q. Who held the tapeline at the top?

A. The bosun went up to the top with the tapeline, and Mr. Bentz held it on deck, and I looked to see if it was straight up and down.

By Mr. BROWN:

Q. You were at the masthead?

A. No. I was on deck; and the bosun had the tapeline in his hand, with the line around his finger, and held it at the top.

By Mr. KIRLIN:

Q. Could you see?

A. Yes. The bosun held the tapeline like this (witness illustrating), and had the line over his finger.

Q. You could see him hold it at the top?

A. Yes. He held it at the top, and the mate stood on deck.

Q. Did you read the tapeline yourself?

A. I read it myself.

39 Q. How far was it from the top of the mast to the deck?

A. The mainmast was 139 feet 10 inches, and the foremast was 136 feet and 8 inches, I believe, and the mizzen-mast 129 feet, I believe. I give the statement—I have put it down; the mate has got it in his pocket.

By Mr. BROWN:

Q. Did you make a memorandum at the time?

A. Yes. I made a memorandum, and brought it to Peter Wright, and the mate made a memorandum, and I believe he has got it in his pocket.

Q. Where is your original memorandum?

A. I believe I have got it yet in my pocket. I put it on a small piece of paper.

Q. Produce it, if you can.

A. There it is! I put it on a small piece of paper. There you are. (Witness produces a piece of paper.)

By Mr. KIRLIN:

Q. (Said piece of paper shown to witness.) Does that correspond to what you testified to?

A. Yes. The memorandum states (witness reading from said piece of paper): "Mainmast, 139 feet 10; foremast, 136, 8; and the mizzen-mast, 129 feet."

Q. Can you tell what the height is from the top of the different masts to the deep-water load line?

A. Yes. I could not tell it exactly. I know the mainmast—it would be 5 feet and 2½ inches, or 2 inches more—5 feet 2½ inches more; and the foremast will be about 7 feet more, and the mizzen-mast 7 feet more. But you can see it on the plan. I couldn't say exactly. I have never measured that, but I know our freeboard, and that is 5 feet 2½ inches.

Q. That is outside the mainmast?

A. Yes. Of course, the ship is more out of water there (witness indicating) than she is midships. So at the foremast it would be at least 7 feet, and by the mizzen-mast 7 feet, and it may be 8 feet by the foremast. But it is plainly to be measured by the plan.

Q. (Counsel and witness looking at plan.) Is this line
40 immediately below the ports showing on the side of the ship the line of the deck?

A. Yes.

Q. Where is the water line?

A. This is the deep-water line (witness indicating)—that is when the ship is loaded.

Q. Where there are two or three blue lines close together that is deep-water line on the plan?

A. Yes.

Q. That is showing 21 feet aft?

A. Yes. 21 feet forward, and 21 feet aft. It should be 21 feet 1 inch aft; 21 feet 1 inch even keel is the deep-water load line.

Q. Do you know of your own knowledge whether the steamer can get under the bridge with those masts?

A. She could not go under the bridge.

Q. Are those masts solid, or in pieces?

A. All solid in one piece.

Q. All in one piece?

A. All in one piece.

Q. Wood, or iron, or steel?

A. Steel.

Q. Steel tubes, are they?

A. Yes; right steel from bottom up to the truck—all steel.

Q. And you have no way of striking the topmast, as they say?

A. No; it could not be done.

Q. Are all the masts solid pieces?

A. All the masts—they are hollow, but the angle iron is inside.

Q. I mean is the outside of them solid from bottom to top?

A. All plates—all built up.

Q. All?

A. All hollow, but built up. They could not have plates 130 feet, but they are built up. The mast is built up.

Q. Are they each riveted together?

A. Each riveted together and angle irons inside. I believe there are eight angle irons inside. They come close together. You may almost say it is a solid mast.

Q. Is there no way of taking any part of it down?

A. No; nothing can be taken down.

Q. When are you going to sail?

A. I believe I get a cargo in on Monday, and, if possible, I sail on Wednesday morning.

41 Mr. Brown reads cross-examination of ANTON MENCKE, as follows:

Q. Captain, you have no personal knowledge of the height of the bridge, have you?

A. No—well, yes, I do know the height of the bridge, but I am not sure of it. I know it is somewhere near 130 feet, but I couldn't say for a foot.

Q. That is what you have been informed, is it?

A. Yes. I have not measured it, but I have seen it in the Nautical Almanac that the bridge is 130 odd feet high. I couldn't say exactly the height of the bridge—exactly to a foot.

Q. In what way do you know anything about the elevation of the decks of your vessel from the water when she is fully loaded?

A. I don't understand you.

(Question repeated.)

A. We have got a Plimsol mark. I know when the ship is loaded we have got 5 feet 1½ or 2½ inches freeboard. I know that. That is measured by Lloyds surveyor.

Q. Between what points is that distance of 5 feet 2½ inches measured?

A. From the deck to the water line.

Q. To the center of your Plimsol marks?

A. Center of the Plimsol mark.

Q. What is the regular load water line?

A. That is the regular load water line.

Q. You have a solid rail above the deck, have you?

A. A solid bulwarks, yes.

Q. Solid bulwarks?

A. Yes.

Q. Extending how far above the deck?

A. That I couldn't say; 4 feet, I think—about 4 feet.

Q. Your impression that there is 5 feet 2½ inches of freeboard above the center of the Plimsol mark is based upon information given you by the owners?

A. No, Lloyds surveyor. I have got a survey to that effect on board. The freeboard is measured by Lloyds surveyor. We are not allowed to load the ship any deeper than that. We have got 5½ feet when the ship is loaded; and the Plimsol mark is cut in with a chisel.

Q. How was that survey made?

42 A. The last survey was in Sidney. We started in 'Frisco, and completed in Sidney.

Q. Was not the cargo which is here in controversy loaded in Barbadoes?

A. No, the cargo was loaded in Java.

Q. Nothing has been taken on since nor discharged until you got to New York?

A. No.

Q. Was your vessel surveyed in Java?

A. Yes.

Q. By Lloyds surveyor?

A. A surveyor.

Q. By a Lloyds surveyor?

A. No—yes—there was a Lloyds surveyor too, but the surveyor was employed by the shippers of the sugar, Erdmann & Sielsken. But he was a Lloyds surveyor—but he had nothing to do with that; all he had to do was to see that the ship was in good condition to take a cargo of sugar. That is, before I reported the ship ready for

loading I had to produce a certificate of seaworthiness to those people before they would accept the ship.

Q. That certificate showed her freeboard as she was then loaded?

A. No, nothing to do with freeboard; only that the ship was a good ship to load sugar.

Q. Don't you receive from Lloyds surveyor a permit showing your freeboard at the time of any certificate?

A. No.

Q. Usually they do?

A. Usually you get reclassed every four years. No, we never get that.

By Mr. KIRLIN:

Q. You get that at periodic surveys?

A. Every four years the ship has to go through a survey—Nos. 1, 2 and 3 survey.

Q. Then you get a classification certificate?

A. Lloyds surveyor comes on board; and if not right, if he thinks the ship is not strong, he may only shift the freeboard up—they may say, instead of loading such a cargo (if it was 20, say) "Load her to 19 feet"—they do that in some cases.

Q. And you get a certificate?

A. Yes.

Q. That is what you refer to?

A. Yes.

43 By Mr. BROWN:

Q. Have you got your certificate?

A. Yes. It is on board. All our Lloyds surveys are on board.

Q. You don't know anything about the freeboard except what you have learned from the certificate, do you?

A. That is all.

Q. You have not measured?

A. I have measured myself, too, but years ago. I have been a good many years in this ship—I have been mate in this ship; and I have also had in other vessels to get the freeboard myself—painting it down. I know the freeboard is correct.

Q. Do you know anything about the freeboard from your personal measurement of it?

A. Well, I know that the freeboard is right. It is in the right place. The Plimsol mark is painted in the right place; I know that; and it is 5 feet 2½ or 5 1½ inches.

Q. Because you measured it?

A. I measured it too.

Q. On this voyage were you loaded down to your Plimsol mark?

A. Yes, as near as we could get it, the ship was loaded to the Plimsol mark.

Q. That is your winter North Atlantic mark, is it?

A. No; to the center of the disc—the winter North Atlantic mark—to the center of the disc.

Q. When you are loaded down to your Plimsol mark, what is your draft forward and aft?
A. The drafts would be 21 feet 1 inch even keel.
Q. 21 feet 1 inch even keel fore and aft?
A. Yes, even keel 21 feet 1 inch. That is what the draft is.
Q. Did you take your drafts on this particular voyage?
A. Yes.
Q. What were the drafts?
A. Well, I don't remember. Perhaps the mate may remember. I think it was 21 feet 3 inches aft, I believe, and 20 feet 9 or 10 inches forward; something like that; I couldn't say exactly, I don't remember; but the mate remembers it. It is in the log book—it is in the ship's log book.
Q. In the ship's log?
A. In the ship's log.

44 By Mr. KIRLIN:

Q. How many tons of cargo?
A. 2,528½ tons net.

By Mr. BROWN:

Q. Dead weight?
A. Yes, net weight.
Q. Dead-weight tons of 2,240 pounds each?
A. Yes.
Q. That is the full capacity of your vessel, is it?
A. Yes.
Q. Ever carry any more?
A. Well, I don't know if we can carry any more. We can't see the thing there. I dare say she might carry more, but, then, that is all we had in—that is the cargo we had in.
Q. You don't know whether you can carry any more or not?
A. Yes; there was plenty of room in the ship to get more in; but I thought the ship was fairly loaded, and that is all; I thought the ship was loaded in the dock.
Q. Who looked to see whether she was down to her marks on sailing?
A. I looked to see myself with the mate.
Q. Did you find she was down to her Plimsol mark?
A. Yes, she was down to her Plimsol mark, but she had a little list; on one side she was down, but on the other side she was not quite down.
Q. Not quite down?
A. No. I went around the ship with the mate, the day we finished loading, and I see and we came to the conclusion that with ten tons more the ship would be down to the mark; and I went ashore, and ordered ten tons more cargo, and cleared the ship out, and went to sea the same night.

By Mr. KIRLIN:

Q. Did you get ten tons?

A. We got the ten tons, and I stopped ashore right away and cleared the ship, and went to see.

By Mr. BROWN:

Q. And the last time you looked at your Plimsol marks, then, your ship was how much above the marks on one side?

A. It was not much; perhaps half an inch.

45 Q. Captain, it looks from the diagram that you have offered in evidence as though each of the masts were in three pieces at the places where the two sets of shrouds join the masts. Isn't that the fact?

A. No.

Q. Don't these rings that are shown here on this diagram bind together several sections of the masts? (Plan shown witness.)

A. No. There are no sections about it. The masts are all in one piece; the whole lot is all in one piece.

Q. If it became absolutely necessary to make your vessel pass beneath some obstruction lower than the top of the highest mast, what would have to be done?

A. What would have to be done to do so?

Q. (Question repeated.)

A. You would have to cut the masts off or take them out of the ship, one of the two.

Q. Would you have to take the mast out of the ship entirely—the whole mast?

A. The whole mast—or you would have to cut them.

Q. Or else you would have to saw it?

A. Or else you would have to saw it.

Q. No other way than those two?

A. No other way. You could do nothing else. There is only just those two ways to get at it.

Q. The mainmast is in the lowest part of the deck, isn't it?

A. Yes.

Q. And the top of the mainmast reaches the highest elevation out of the water?

A. Yes, the mainmast.

Q. You admit that the charterer of this vessel did not waive his claim of right to compel you to proceed to Arbuckle's refinery, don't you, or, in the alternative, to make you pay for the cost of lighterage?

A. I don't know anything about that.

Mr. Kirlin reads redirect examination of ANTON MENCKE, as follows:

46 Q. After you got the additional ten tons on board that you spoke of, do you know whether that further weight brought her down to the Plimsol mark on that side?

Objected to.

A. Yes.
Q. Did you see that yourself?

Objected to.

A. I saw the ship down to the mark.
Q. Did you then, before the steamer left, know of your own knowledge whether she was down to her Plimsol mark on both sides?

Objected to.

A. When I came on board——
Q. Did you?

Objected to as inconsistent with the witness's previous testimony.

A. Yes.
Q. Was she?

Same objection.

A. She was down to the mark.
Q. How long is the *Benlarig?* What is her length?
A. 280 feet, if I am not mistaken.
Q. And her beam?
A. Her beam is 26 feet, I believe.
Q. She is a three-masted, square-rigged ship?
A. Square-rigged ship, yes.
Q. Steel vessel?
A. Iron vessel.

Recross read by Mr. BROWN:

Q. Could you see from where you stood the place where the end of the tape was held while the measuring was going on?
A. Yes. I could see both. I could see the bosun, and I
47 could see the mate, and I could see the line straight up and down—the tapeline straight up and down.
Q. Could you see if the tapeline was wound around the mast?
A. No, it was straight up and down—right straight up and down.
Q. Could you, from where you stood, distinguish the end of the tapeline?
A. I could see both ends, yes.
Q. Use a glass?
A. No. I could see the man had his finger over the truck—see that the man had his finger like this (illustrating) with the line on his finger—ring around his finger.
Q. Is there a ring at the end of the tape?
A. No; he made a bowline.
Q. He held up the line with the tape around his finger?
A. Yes.
Q. Was it not a steel tape?
A. No.
Q. What kind of tape was it?
A. A cord—a cord like this. (Witness pointing to window cord.)

Q. It was a cord?

A. It was a cord like this. (Witness indicating a cord to the window shade, about 3/32 of an inch thick.) They held a small black line, with a loop in the end of it, at the truck, and cut it off at the deck; and then laid this cord fore and aft on deck, and measured it with a tapeline fifty feet long.

Mr. Kirlin reads direct examination of HERMAN BENTZ as follows:

Q. Are you the mate of the *Benlarig?*

A. Yes.

Q. Did you help the captain measure the masts yesterday?

A. Yes.

Q. How did you measure them?

A. With a tapeline, right from the top down to the deck.

Q. But what did you put on the masts first?

A. A spun yarn—long line—spun line—and then measured over with a tapeline afterwards.

Q. Measured the line with a tapeline afterwards?

A. Yes.

48 Q. Did you stretch the line out on deck?

A. Laid it right on the deck—flat on the deck.

Q. When you were measuring the height of the masts with the line—not the tapeline, but the other line—what part of the operation did you perform?

A. I held one end and the captain held the other end.

Q. Which end did you hold?

A. I held one end of the tapeline—the roll.

Q. No; but when you were measuring the mast?

A. The top end.

Q. Did you go aloft?

A. Yes; and the captain was holding the lower—at least, the captain was down below and held the lower end.

Q. Was not the bosun at the top?

A. The bosun was higher up than me. I was not exactly right up; I was further down than he was. He was right up to the truck.

Q. He took one end up to the truck?

A. Yes.

Q. He held the other end at the deck?

A. Yes.

Q. You then came down and cut that off?

A. Yes.

Q. Did you make it tight before you cut it off?

A. Yes, all tight—tight up and down.

Q. Then you stretched it out on deck?

A. Stretched it out on deck, and measured it over with a tapeline.

Q. Who held the ends of the tapeline while you were measuring on deck?

A. I one end and the captain the other.

Q. How long was this tapeline?
A. Fifty feet.
Q. How did you mark the first 50 feet on your line?
A. There was 50 first.
Q. How did you mark that?
A. Took it in my hand, and then measured the next 50 feet, and took that in my hand.
Q. And did you hold it till the captain came up to your 50 feet?
A. The captain was there measuring it.
Q. And then you measured the next 50 feet?
A. Yes, and then the remainder.
Q. And then the remainder?
A. Yes.
Q. Did you make any memorandum of what the lengths were?
A. No, I did not
Q. Do you remember?
A. How many inches?
49 Q. Do you remember how high the different masts were?
A. 139 feet and 10 inches.
Q. Which one?
A. The main one.
Q. How much was the foremast?
A. The foremast is by the measurement 139 feet 8 inches. (Witness looking at paper.)
Q. And how much was the mizzen-mast?
A. 129 feet.
Q. That is to the deck, is it?
A. That is to the deck.

By Mr. BROWN:

Q. When did you make this memorandum?
A. Yesterday, when we measured it. I just put it down temporarily, so I would not forget it.

By Mr. KIRLIN:

Q. Are the masts of iron?
A. Yes.
Q. How many pieces are they in?
A. Well, that is what I couldn't say exactly; but they are all built out of iron—like plated together right up and down.
Q. Are they in sections?
A. No.
Q. Do they come apart?
A. No.
Q. What would you have had to do to go under the bridge?
A. I don't know; I couldn't tell what to do to go underneath the bridge—we would either have to cut the mast off or take it off.
Q. Take it off?
A. That is the only way.
Q. One or the other. Was there any way of lowering any part of the masts?

A. Nothing at all.
Q. Any of them?
A. Nothing.

Cross-examination by Mr. BROWN:

Q. This measurement you say was taken yesterday, was it?
A. Yes.
Q. What kind of a line was the line that you stretched along the masts?
A. Piece of marline or spun yarn—marline, I think.
Q. How thick?
A. I couldn't exactly say.
50 Q. Was it a small cord?
A. Big as a small cord, like a fishing line.
Q. About the size of fish line?
A. Yes.

By Mr. KIRLIN:

Q. How does it compare with window cord?
A. Yes, something like that. I think it was about the same size.

By Mr. BROWN:

Q. About the same size as ordinary window cord?
A. Yes.

The witness indicates cord between 1/16 and 1/8 or about 3/32 of an inch in diameter.

Q. That line is easily stretched, isn't it?
A. Yes—no—it won't stretch much; oh, no, it won't stretch much.
Q. Suppose you took a length of ten feet of that cord, that marline, how much could you stretch that length of ten feet?
A. Ten feet? If I put the whole weight as much as it will bear, it might stretch an inch or an inch and a half, perhaps two.
Q. If one man stood at one end and the other man at the other end, you could stretch it an inch and a half, you think?
A. Yes, I dare say you would.
Q. Stretch it three or four inches in the length of ten feet?
A. No, not that much. I should say about an inch.
Q. About one inch in ten feet?
A. Yes.
Q. Did you ever try it?
A. No, I never tried it. But I handle that every day. I generally know almost what it will stretch.
Q. Could you see that the top of this line was held even with the top of the mainmast, when you measured the mainmast?
A. Yes, right on top.
Q. Where were you when you observed it was even with the top?
A. I was about three parts down.

Q. On the mast itself?
A. Yes—clearing the line, and seeing that it was straight up and down.
51 Q. Did you take the observation from any other position?
A. No.

Redirect examination read by Mr. KIRLIN:

Q. Was it ordinary tarred marline that you used?
A. Ordinary tarred marline.

Mr. KIRLIN: The vessel is in port; and if the opposing counsel have any question about the height of the masts, I beg leave to suggest that they send somebody down and have them measured. Ample opportunity and assistance will be afforded.

JAMES G. SPAULDING, being duly sworn and examined as a witness for the libellant, testifies:

By Mr. KIRLIN:

Q. What is your position?
A. I am tide observer of the United States Coast Survey at Fort Hamilton, N. Y.
Q. How often do you observe the tide daily?
A. Twice; but we have a self-regulating tide gauge from which we get a constant record of the tide. Tides are estimated from the sheets taken from these tide gauges: I simply make observations twice a day simply as data to work from, but the tides are all worked from the tide sheets that are obtained on the self-registering tide sheets.
Q. Do you preserve a record of your observations?
A. Yes.
Q. Have you a record covering the month of April, 1899, with you now?
A. Yes, sir; that is, the most of it.
Q. This vessel arrived in port on the 14th of April? I would be glad if you would tell us the difference between high and low water during the days in April from the 15th to the end of the month?
A. From the 15th to the end of the month?
52 Q. The rise and fall at Fort Hamilton where you observed it?
A. From the 14th?
Q. Begin with the 15th and give the difference between high water and low water?
A. The first difference is 3.6 feet.
Q. Does that represent the rise and fall of the tide on the 15th?
A. Yes; that is the difference between the first low water on that day and the first high water.
Q. Is that the extreme rise and fall of the tide for the day?
A. That was on that day. The average rise and fall is about 4.5, but this was the first difference on that day.
Q. Now give us the 16th, please?
A. 3.5.

Q. 17th?
A. On the 17th, 2.9, tides were running low here. The first one that came early in the morning would be 4 feet.
Q. Give the data for the next day?
A. The 18th, 3.3.
Q. Give the next day?
A. 19th, 3.2.
Q. 20th?
A. 20th, 3.5.
Q. 21st?
A. 21st, 3.7.
Q. 22d?
A. 4.1.
Q. 23d?
A. 3.4. No, I will correct that, it is 4.4.
Q. 24th?
A. 4.5.
Q. 25th?
A. 25th, 4.9.
Q. 26th?
A. 26th, 5.1.
Q. 27th?
A. 27th, 4.7.
Q. 28th?
A. 28th, 4.8.
Q. 29th?
A. 29th, 4.4.
Q. 30th?
A. 30th, 4.2.
Q. 30th?
A. 30th, 4.2. That completes the month.
Q. Now give us the 1st and *and* 2nd of May and that will be the last.
A. The 1st and 2d of May. The 1st of May is 5.3; 2d of May, 4.8.
Q. What did you say the average rise and fall of the tide was at Fort Hamilton?
A. 4.53; 4.5 is near enough.
Q. For what period of time was that average taken?
53 A. That covers the period for the years 1893, 1894, 1895, 1896, 1897 and 1898, it comes up to the close of 1898.
Q. Is there any other point near here from which there is a Government record kept of the rise and fall of the tide?
A. I think not.
Q. Would the rise and fall vary appreciably between Fort Hamilton and the Brooklyn bridge.

Objected to unless the witness has some knowledge about it.
The COURT: Unless the witness knows it will not answer.

A. Of course it would be guesswork with me, my knowledge.

These records here given you are measured facts; they are the results of actual measurements.

Q. Have you ever had occasion to observe whether there was a variation in the rise and fall of distance of four or five miles?

A. The best indication of that would be you will find from the United States Coast Survey tide tables, the tide predicted; the tides given for Governor's island, that would be part way between my station and Brooklyn bridge; and those predicted tides in the absence of actual observations would be the best probably that could be obtained.

Q. What is the difference in the predictions between those two points, do you remember?

A. No. I shouldn't dare trust to my memory, but the difference is small; the difference is small between those two points.

Q. Are those differences not differences of time rather than height?

A. I think so, I think so; although the heights are also given for both places. You will find in the prediction of tides in the United States Coast Survey tide tables they are given for Sandy Hook and they are also given for Governor's island; they are not given for the Fort Hamilton tide station, but at Fort Hamilton tide station I have the actual measurements, the absolute facts as obtained by constant measurement.

54 Q. What is your opinion and judgment as to whether there would be any difference in the ultimate rise, leaving out of view the question whether it would be high up here at the same moment that it would be high at Fort Hamilton?

A. Oh, it would be—the time of the tide would be little later at Governor's island; the tide would be earlier at Sandy Hook than at Fort Hamilton, a little earlier at Governor's island than at Brooklyn bridge. I should say perhaps the difference might be between Sandy Hook and Governor's island on an average, say, 25 minutes earlier at Sandy Hook than at Governor's island.

Q. About the difference in the height?

A. I don't think the difference in the height would be more than one to two-tenths of a foot.

By the COURT:

Q. A few moments ago you said it would be a matter of guesswork; is this based upon knowledge theoretical or practical?

A. What I have referred to as regards the tide tables, they are computed by the best laws known pertaining to the tide.

Q. The objection is raised here that you are not qualified to give an opinion as to the difference in height of the tide. I want to know what qualification you have before you give your opinion, that is all.

A. So far as giving the opinion is concerned it would be based chiefly on the tide tables, on the difference that is contained there. And the authority of those tide tables, so far as any station or any place outside of my particular tide station, of course the authority of those tide tables would be better than my authority.

Q. Your knowledge is based upon the tide tables?

A. So far as any place outside of my particular station; at my own station it is a matter of actual measurement.

Q. I am speaking about Governor's island and the bridge.

A. Certainly, so far as that is concerned it would be based on the tide tables.

Q. The tide tables could be produced here?

A. It would be better than anything I could give.

55 Cross-examined by counsel for respondent.

By Mr. BROWN:

Q. How long have you been observer of tides at Fort Hamilton?

A. I commenced the observations there in 1893, January, 1893, although I had been in charge of other tide stations previous to that.

Q. When did the spring tides occur in the month of April?

A. The spring tides occur at new and full moon. I should have to refer to the tide tables to see just when that came, or to an almanac.

Q. Is the difference between spring high and spring low water constant from month to month or not?

A. No; there are slight differences. The spring tides on an average would be about a foot and three-quarters beyond the neaptides, that is the rise and fall at spring tide——

Q. What is the average difference at spring tides between high and low water?

A. It would be about between neap and spring tides, you mean?

Q. No, no. Between spring high water and spring low water, the average difference?

A. For 1898 it was 5.44 feet, that is for the whole year.

Q. What is the smallest difference that you know of between spring high and spring low water?

A. I can give them to you for this year right through. For January it was 4.71; February, 5.41; March, 5.57; April, 5.53; May, 5.28; June, 5.24; July, 5.44; August, 5.75.

Q. That is sufficient. Have you at Fort Hamilton a tide gauge upon which the mean high water is marked, the average mean high water?

A. No, but I have the fact; I have it; I can give it to you. We obtain that from the record of observations, it is computed from the record of observations. The mean high water you say?

Q. Yes.

A. The mean high water. That is, the height above the zero of the tide staff for 1893 was 8.05.

Q. What is the zero of the tide staff?

A. The zero of the tide staff is 3.61 feet below mean low
56 water; if you subtract 3.61 from these high waters that I give you that would give you the height above mean low water. Of course when we go to a tide station we don't know what mean high or low water is; our object is to ascertain that from the observations.

Q. The greatest difference you appear to have given us between high water and low water beginning with April 20 and ending with May 2d appears to be 5.3 feet. Is that the time of spring tide?

A. These are the average for a whole month.

Q. Don't I understand from your direct examination you gave us the actual difference between high and low water on particular days?

A. Yes; of these particular days you called for.

Q. Now I am asking you whether the spring tides occurred in any one of those days?

A. Yes, I presume the spring tides did.

Q. Do you know?

A. Yes. We have two spring tides in every month, that is they occur at every new moon and every full moon.

Q. Was May 1st such a spring tide?

A. I don't know. Nobody could tell without referring to the almanac to see when new and full moon came. Refer to an almanac or tide tables and see when new and full moon came and you would thereby ascertain just when the spring tides were.

Q. Can you tell me at the next spring tide after April 20 when the greatest difference occurred and how much it was between mean high water and the lowest water?

A. You will have it from those results that I gave you; I gave them all to you I think.

Q. What you have given us here has been the difference between high and low water on particular days. That high water may have been neap high or spring high. I am asking what the difference would be between mean high and low water at the time when the difference was greatest.

A. Yes. I have some records that I have left at home that would give that more accurately than anything that I have here. I have at home the exact high waters and low waters for every one
57 of those days; if you are particular about it I think I better go home and get those.

Q. Can you answer the question from what you have here?

A. Please put the question again.

Q. (Read to witness.) What you have given us here has been the difference between high and low water on particular days. That high water may have been neap high or spring high. I am asking what the difference would be between mean high and low water at the time when that difference was greatest.

A. I could give you that more fully by getting——

Q. Can you give it to us from what you have here?

A. I don't think I can exactly.

Q. Is mean high water a fixed plane or is it the average between spring high and neap high?

A. It is a fixed plane; it is a fixed plane; and the spring high waters are above the mean high waters, and the spring low waters are below the mean low water, that is, the water rises higher and falls lower at the spring tides than the average of all the tides.

What we call mean high water is the average of all the high waters; what we call mean low water is the average of all the low waters.

Q. Mean high water then is half the difference between the average of all the spring high waters and all the neap high waters. Is that correct?

A. No, no. The mean high waters are the average of all the high waters and the mean low waters are the average of all the low waters. Now the spring tides and the neap tides don't take all of the tides; what we use for spring tides is just at the time; we take the tides for the day when the tides show the effect of the combined forces of the sun and moon the greatest; and the neap tides practically show a difference between the force of the sun and moon. We pick out one day for the spring tide at new moon and one day for the spring tide at full moon, whereas our mean water includes all; our mean high water includes all the high waters and mean low water includes all the low waters.

Q. Mean high water means the same fixed point year after year, does it not?

58 A. No, it changes. In getting mean high water, for instance, to the close of 1898 we used all of the high waters from the beginning of the tidal observation to the close of 1898. In getting the mean low water we use all the low waters from the beginning of the tidal observations to the close of the period for which we give it. I am giving the tides; in giving the mean high and low waters I am giving them from the beginning of January, 1893, to the close of 1898, December, 1898. The year 1899 is not yet worked out.

Q. The mean high water is computed each year, is it?

A. Yes, sir.

Q. And may be different?

A. Yes, sir. I can give you the mean high waters for each year.

Redirect by counsel for libellant:

By Mr. KIRLIN:

Q. Give us the mean high water for each of those years, please?

A. 1893, 8.5.

Q. That is on your gauge?

A. That is obtained from my records. I work it up from my records.

Q. That is 3.61 above the zero?

A. Yes, sir. In order to reduce that to mean low water you want to subtract 3.61 from that.

1894	it was	8.10
1895	"	8.03
1896	"	8.15
1897	"	8.24
1898	"	8.26

Now, if you subtract 3.61 from each of those numbers it will give you the height of mean water above the plane of mean low water,

which we will call zero; calling the plane zero subtract 3.61 from each.

Q. Now, will you please give me the extreme high water according to your gauge for those days, beginning April 15 and ending May 2d, one after the other.

Objected to as immaterial and irrelevant; that all that is in issue here is the lowest water. Objection overruled.

59 A. As I give these you will want—I will give the height above the zero of the tide staff and then after I give them you can subtract 3.61 from each one and it will give you the height above the plane of mean low water.

15th	the	highest	high	water	was			8.3
16th	"	"	"	"	I find	is		8.2
17th	"	"	"	"	"	"	"	7.7
18th	"	"	"	"	"	"	"	7.7
19th	"	"	"	"	"	"	"	7.9
20th	"	"	"	"	"	"	"	8.0
21st	"	"	"	"	"	"	"	8.2
22d	"	"	"	"	"	"	"	8.2
23d	"	"	"	"	"	"	"	8.5
24th	"	"	"	"	"	"	"	8.9
25th	"	"	"	"	"	"	"	9.0
26th	"	"	"	"	"	"	"	9.1
27th	"	"	"	"	"	"	"	9.4
28th	"	"	"	"	"	"	"	8.9
29th	"	"	"	"	"	"	"	8.8
30th	"	"	"	"	"	"	"	8.5
May 1st		"	"	"	"	"	"	8.5
" 2d		"	"	"	"	"	"	8.3

With 3.6 subtracted from each of those it will give the height above mean low water.

Q. I should like to be sure you correctly understood one of the questions asked you by the other counsel. You gave certain data for February, March, April, May, June, July and August?

A. Yes, sir.

Q. What was that information? What were those differences that you gave here?

A. Those differences were between the low waters and the high waters as they actually came.

The COURT: That is what you gave to this counsel at the outset. The other counsel asked you to give the difference between high water and low water, as I understood him, on the spring tides.

The WITNESS: On the spring tides?

60 Q. You gave certain figures.

A. Oh, I gave the figures of the spring and high tides as they came for 1898, I was giving them for the year 1898.

Q. What I want to know is whether those figures that you gave him were the difference between high and low water of the spring,

or whether it was the difference between high of spring and low of neap?

A. It was the difference between the high and low water of the spring tides, the difference between the high and low waters of the spring tides.

Q. That is of one day?

A. No. That was for the different months in the year 1898.

Q. You say there are two days in each month when you get that spring tide?

A. Yes, sir.

Q. And what you gave is the data of the observations on those particular days that you select as the spring-tide days?

A. Certainly; where the spring tide is supposed to show greatest. I can give you the spring tides for 1899 up to the close of September if you wish.

By the COURT:

Q. Before you leave the stand tell me again when you figure high water as being so many feet, what is the standard, above what?

A. Above mean low water. No; as we actually work them up.

Q. As you gave them here to counsel a few moments ago?

A. That is the height above the zero of the tide staff, and the zero of the tide staff is 3.61 feet below mean low water. Mean low water is the average of all the low waters, mean high water is the average of all the high waters; and we find by that average to the close of 1898, from 1893 to 1898, that the average of all the low waters was 3.61 feet from the zero of my tide staff.

Q. Then by subtracting that from the heights you have given, that would give the height above mean low water?

A. Yes, sir; you subtract 3.61.

61 CHARLES C. MARTIN, being duly sworn and examined as a witness for the libellant, testifies:

By Mr. KIRLIN:

Q. What is your official position?

A. Chief engineer and superintendent of the New York and Brooklyn bridge.

Q. How long have you held that position?

A. About 16 years.

Q. Will you kindly state the height of the central span of the Brooklyn bridge above mean high water?

A. 135 feet.

Q. Can you give it above the average of mean low water?

A. I cannot.

Q. Have you a diagram of the bridge, official diagram of it, showing the height at various points?

A. I have; yes, sir.

Counsel for libellant offers the diagram in evidence.

Cross-examined by counsel for respondent.

By Mr. BROWN:

Q. Your information as to the height of the bridge above mean high water is derived from the diagrams and surveys of Mr. Roebling, are they?
A. Yes, sir.
Q. You have no other knowledge of your own?
A. I never measured the height myself.

Counsel for respondent moves to strike out the testimony.
Motion denied.
The diagram is offered in evidence and marked Libellant's Exhibit 1.

Q. Isn't it the fact that the Government engineers have recently measured the height of the bridge above mean high water?
A. I believe they have. I gave them permission to do so.
Q. Isn't it the fact they found 135 feet 5 inches?
A. I do not know.
62 Q. Do you know whether that is correct or incorrect?

Objected to.

Q. If you had the report of the Government engineers that this height was 135 feet 5 inches, your information was just as reliable from that source as from Mr. Roebling's diagram, was it not?

Objected to.

A. I think I should rely entirely upon Colonel Roebling's statements. As far as I know of the Government engineers their work is very accurate. What these men have done I don't know.

By the COURT:

Q. Are you custodian of the Roebling measurements?
A. I have all the measurements that have been made.
Q. They are in your charge as superintendent of the bridge?
A. Yes, sir.

By Mr. KIRLIN:

Q. And they are shown on that diagram?
A. They are shown on that diagram with Colonel Roebling's signature in, yes.

By Mr. BROWN:

Q. You don't know what the plane of mean high water is under the bridge, do you?
A. Yes, sir.
Q. What is that plane above the zero?
A. The plane of mean high water was obtained from a bench-mark in the navy yard. We understand, and we know, that the

navy has a point at the dry dock in the navy yard which they call mean high water, and from that we ran lines of levels to the bridge and fixed a point corresponding at the bridge and the bridge was measured from that elevation.

Q. You don't know how that compares with the zero of the tide staff at Fort Hamilton, do you?

A. I do not.

Libellant rests.

63 *Respondents' Case.*

GEORGE R. MACDOUGALL, being duly sworn and examined as a witness for the respondents, testifies:

By Mr. BROWN:

Q. What is your business?

A. Sugar broker.

Q. Member of what firm?

A. Czarnikow, MacDougall Co., Ltd.

Q. How long have you been in that business?

A. In this particular firm?

Q. In the sugar business?

A. 30 years.

Q. I hand you the charter-party of the *Benlarig* and ask you whether you are familiar with that form of charter? Please examine it.

A. Yes, quite familiar.

Q. Is it a form in common use?

A. In common use, yes.

Q. How long has it been so to your knowledge?

A. All the time we have been receiving Java cargoes in New York.

Q. Which is 30 years?

A. No; oh no. The Java cargoes have only been in port here within the last 15 years.

Q. I wish to call your attention particularly to the following provision: The vessel after being loaded as otherwise specified is to proceed to New York, among other ports, or so near the port of discharge as she may safely get, and deliver her cargo always afloat in a customary place and manner at such dock as directed by charterers agreeably to bills of lading. How long do you know of that clause being in charter-parties?

A. I don't think I have ever seen a charter-party in which it did not appear in some form or other.

Q. Has that clause received a practical construction by custom in respect of whether charterers have a right to direct a vessel above the bridge when the mast is too high to pass under the bridge?

64 Objected to as immaterial and irrelevant, as to any custom of the port, that the provisions of clause 4 is specifically stated.

Objection overruled.

The COURT: I will hear what the witness has to say.
A. Yes; it has.
Q. What is the construction?

Objected to.

A. That ships lower the topgallant-mast so as to be able to go under the bridge.

By the COURT:

Q. Suppose they can't do it?
A. I consider him still bound to deliver his cargo at the place designated.

Counsel for libellant moves to strike out the answer as not responsive; that the question is as to the custom.

By the COURT:

Q. You have no right to give your personal opinion, but the question is, is there any custom in case the mast is too high, permanent mast and can't be lowered, with reference to the matter observed in this port?
A. I do not know of any case of the kind that occurred similar to it.

By Mr. BROWN:

Q. Do you know of charter-parties in which the effect of the custom you have referred to has been limited by the contract itself?

Mr. KIRLIN: I don't know what that means.
The COURT: Whether he has ever known that custom to be practically limited by charter-party.
Mr. KIRLIN: I think it calls for a conclusion of law.
The COURT: I don't think that is proper.
Mr. BROWN: I withdraw the question.

65 Q. Do you know of charter-parties in which an express clause has been inserted to the effect that the vessel shall not be ordered above the bridge?

Objected to as immaterial. Objection sustained.

Q. Where vessels are ordered above the bridge and can only reach their designated dock by housing the topmast at whose expense is this done customarily, if there is such a custom?

Objected to as immaterial; that that is not the question in issue here.
Objection sustained. Respondents except.

Q. What is the customary place to discharge sugar in the port of New York?

Objected to.

A. The customary place for the discharge of 80%, I should say, of the sugar that comes to New York is above the bridge.

By the COURT:

Q. Where, Mr. Witness?

A. At the various refiners' docks.

Q. Then they are various; there is no particular place above the bridge?

A. Arbuckle Brothers, Havemeyer & Elder, the New York Sugar Refining Company.

Q. Is it discharged to their people because it is consigned to them, or because it is a custom to discharge there?

A. Because they are the owners of the cargo; it belongs to them.

By Mr. BROWN:

Q. Do you know the dock adjacent to Arbuckles' refinery?

A. Do I know it? Yes I have been there.

Q. What do you say as to whether it is a reasonable and customary place to discharge sugar?

A. It is a reasonable and customary place to discharge sugar.

66 Q. I call your attention to the following clause in the charter-party: "Lighterage, if any, to reach the port of destination or deliver the cargo at the port of destination remains for the account of receivers, any custom of the port to the contrary notwithstanding." Are you familiar with that clause?

A. Yes, sir.

Q. How long has that been in charter-parties, so far as you know?

A. I think it has been existing all the while; all my experience that clause existed.

Q. It is a commonly included clause in all your experience in the sugar trade, is it?

A. Yes, sir.

Q. Has it received a practical construction from custom?

Objected to as immaterial and incompetent.

Objection overruled.

Q. What is the custom with respect to the construction of that clause?

A. I don't quite understand what you mean.

Q. To what state of facts does that clause apply, according to custom?

Objected to.

Objection overruled.

A. I consider that——

By the COURT:

Q. Not what you "consider"—what the custom covers or interprets in that clause; how does custom interpret that clause?

A. Please repeat the question.

By Mr. BROWN:

Q. In what manner is the clause which has been read to you interpreted by custom?

A. At the port of New York?

Q. "Lighterage, if any, to reach the port of destination or deliver the cargo at the port of destination remains for the account of receivers, any custom of the port to the contrary notwithstanding."

A. The custom is that that clause would only become
67 operative if there wasn't sufficient depth of water for the vessel to go to the discharging berth.

Q. And it has no other application, then?

A. None.

By the COURT:

Q. When did you ever know an instance when that was interpreted in that way?

A. I am unable to give an instance.

Q. Can't you remember a single instance in which that interpretation has been put upon that clause?

A. No, I can't recall one.

By Mr. BROWN:

Q. Do you remember whether vessels of ordinary draft come through Hell Gate?

A. I do not, no.

Q. Do you know whether the height of vessels' masts appears in Lloyds Register?

Objected to as immaterial.

The COURT: If he knows whether they do appear in Lloyds Register he can state.

A. I do not.

By Mr. KIRLIN:

Q. You don't know?

A. I don't know.

By Mr. BROWN:

Q. Do you know how many vessels there are having masts in one piece which are too high to go under the bridge?

A. I do not.

Q. Can you say whether they are few or many?

Mr. KIRLIN: He says he doesn't know.

A. Few.

Q. They are few?

A. Yes, sir.

Q. You have already noticed the clause in this charter which gives the charterer the right to designate the dock of discharge. When according to custom should that designation be made, if there is any custom on the subject?

A. When?

68 Mr. KIRLIN: The charterer did not designate the dock here. We have it in writing and it is in evidence.

The WITNESS: Within 48 hours.

Q. Within 48 hours of what?

A. Of the vessel's arrival.

By the COURT:

Q. Upon a vessel arriving and reporting, what is that custom founded on at the present time? Is there any rule of any exchange or anything of that kind that governs it?

A. There is a customs rule that governs it to some extent, I think.

Q. How long has that custom been in force—48 hours?

A. I am unable to say; I am not able to say.

Q. Has it been in force a year?

A. I should say so, yes.

Q. About a year?

A. For a sailing vessel I should say yes.

Q. Not longer than that?

A. Oh, longer than that, yes.

Q. How much longer?

A. I am unable to say.

Q. Can't you say, Mr. Witness, whether it has been in force for one year or as much as five years?

A. I should say as much as five years.

By Mr. BROWN:

Q. Can't you compare it with the time of your entering business?

A. I don't remember when it was not a custom.

By the COURT:

Q. Is there any custom limiting it to 24 hours?

A. With respect to steamers, I believe there is.

Q. Do you think it is confined to steamers?

A. I think so, yes.

Q. How long has that custom existed?

A. I am not aware.

Q. Have the time of sailing, and the notice of readiness of the vessel to discharge, anything to do with the time for designating the dock?

69 A. Yes; the time counts from the time the information is given to the receivers of the cargo.

Cross-examined by counsel for libellant.

By Mr. KIRLIN:

Q. Where is the other 20% of sugar delivered now? You spoke of 80%.

A. A portion of it is delivered at Jersey City and a portion up at Yonkers.

Q. Isn't sugar all discharged along the Brooklyn water front from time to time?

A. From time to time, yes, sir.

Q. You might also call that a customary and proper place, couldn't you?

A. It would be a proper place.

Q. The reason why the sugars go up there now is because Messrs. Arbuckle and the American Sugar Refining Company are the principal purchasers in the port, isn't it?

A. Yes, sir.

Q. And prior to the time they became such principal purchasers 80% of the sugar didn't go there did it?

A. No, it did not.

Q. Where did it go then?

A. There were fewer refineries above the bridge at that time, and consequently a smaller quantity of sugar used there.

Q. And more of it discharged on the water front below the bridge?

A. At the other refineries.

Q. As matter of fact, when ships get in agents generally call you up and confer with you on the telephone, do they not, and ask for orders?

A. We are not receivers of cargo as a rule.

Q. Upon what knowledge do you testify with regard to the time to furnish a dock if you are not a receiver?

A. We do receive some cargoes, but not—you are asking me what the practice is with reference to the agents calling up receivers of cargo.

Q. Calling you up when you receive cargo. Isn't that generally done?

A. Generally, yes.

Q. You don't rely on or wait for formal notice, do you?

A. Not entirely. We can call for them.

Q. Very often no formal notice is served. Isn't that so?

A. Yes.

70 ALFRED D. SNOW, being duly sworn and examined as a witness for the respondents, testifies:

By Mr. BROWN:

Q. What is your business?

A. I am manager for W. R. Grace & Co. in the shipping business.

Q. Do you act as agents for vessels?

A. Yes, sir.

Q. How long have you been connected with Grace & Co.?

A. For six years. Prior to that with the firm of Snow & Burgess.

Q. How many years in the shipping business have you had?

A. 42 years.

Q. Are you familiar with that form of charter that I hand you?

A. Yes, sir, moderately familiar with it.

Q. Is it in current use or not?

A. I believe it is, yes, sir.

Q. How long have you been familiar with that form of charter?

A. I consider that a general form of East India charter, and I have had them passing under my notice all my life practically; all my business life.

Q. Please take notice of the following: "Discharged at New York or some other port, or as near thereto as she may safely get and deliver cargo always afloat in customary place and manner," and also clause 4 of the charter referring to lighterage; how long have you known those two clauses being in current use?

A. The exact language of those two clauses varies according to the ideas of the people who have the charter-parties printed. All charter-parties don't conform in their language exactly.

By the COURT:

Q. Take this just as it is. How long have you known of those words as they occur there being in a charter-party?

A. I can't say that I remember distinctly other charter-parties having exactly the same phraseology in every respect.

By Mr. BROWN:

Q. Have other charters had substantially similar provisions?

A. So I regard it, yes, sir.

71 Q. What difference would there be, what differences have you in mind when you say they would not be identical in phraseology?

A. Some charter-parties would simply have the provision in respect to lighterage, that the lighterage, if any, should be borne by the charterers.

Q. And as to "reaching the port of discharge or as near thereto as she can safely get," and as to the designation of the dock by charterers?

A. That is customary in all full cargo charters, yes, sir.

Q. What construction, if any, is put upon the first clause by custom in respect of the vessel going above the bridge where the masts are too high or are very high?

A. I consider the custom is established for the vessel to go above the bridge.

Objected to. Objection overruled.

Q. Do you know how serious a thing it is for a vessel to cut her masts where they are all in one piece?

Objected to as immaterial, irrelevant and incompetent. Objection overruled.

A. I only recollect of one ship consigned to us, the mast of which being too high was thus cut, and my impression is that the actual cost of it might have been thirty to forty dollars.

Q. Would a vessel, in your judgment, having a mast of 140 feet in height and being compelled to cut off about five feet be seriously disabled by so doing.

Objected to on the grounds stated and that there is no qualification shown by witness to testify on the subject. Objection overruled.

A. No, sir. That particular mast is not a very important mast, it has not very important work to do.

By the COURT:

Q. What mast?
A. The jigger-mast, as it is called in one of these four-masted barks.

72 By Mr. BROWN:

Q. What do you mean by jigger-mast?
A. The after mast of all, sir.
Q. In this case the mast to be cut was the mainmast, being a ship of three masts. Please confine your answer to the cutting of the mainmast.
A. If it was the mainmast it is the head——
Q. It is the second mast of the three?
A. It is the head of the mast.
Q. The top of the mast?
A. Yes, sir.
Q. What is your answer?
A. It is not a serious matter at all.
Q. When did the instance happen of the cutting of the *Englehorn's* mast that you have referred to?

Objected to.

A. In 1895.

The COURT: I don't think we better go into what happened to some other masts. The witness has had experience with it and that qualifies him.

Q. Do you know whether vessels of 21 or 22 feet draft can pass through Hell Gate?

Objected to as immaterial.

By the COURT:

Q. Do you know?
A. Yes, sir.

By Mr. BROWN:

Q. Can they?
A. Yes, sir, they can.
Q. Is there any obstruction anywhere in the Sound to prevent a vessel drawing 21 or 22 feet from reaching Arbuckles' refinery by way of the Sound?
A. No, sir.

By the COURT:

Q. Is that a customary way for ships to come from Java—through Hell Gate?

A. No, sir.

By Mr. BROWN:

73 Q. Is the height of a vessel's mast generally known in the shipping trade?

A. There is great variance in that respect.

Q. Is it in Lloyds Register?

A. No, sir, it is not.

Q. Do you know how many vessels there are that have too high masts in a single piece to go under the bridge?

A. I do not, sir.

Q. What construction is given to clause No. 4 by custom, if any?

Objected to.

The COURT: He may state if he knows.

A. I see nothing in that clause myself inconsistent with the general custom.

Q. You testified that was a common clause. Now, I ask if it has received a construction by custom?

The COURT: If he knows whether there is any customary construction of that clause as it stands he can state it.

A. In respect to what?

Q. In respect of the circumstances to bring it into play?

A. I should say it was customary for a vessel having that clause in her charter-party to go to the berth designated by charterers for the discharge of her cargo providing it was a berth where she could lie afloat and notwithstanding it was above the East River bridge.

Q. According to the customary interpretation when is the charterer bound to pay for the expense of lighterage?

Objected to.

The COURT: Under the 4th clause.

A. That refers to the port of destination. If I could explain what I have in mind, this vessel is chartered with a range of ports and she has either to go to a safe port in the United Kingdom on the continent of Europe or New York, Baltimore, Philadelphia,

74 and it is proper and customary that the owner of the ship shall provide that wherever he may be ordered under that charter-party he shall be able to float in safety——

Mr. KIRLIN: Wait a moment, please. I object to what is "customary to provide."

By the COURT:

Q. It is not a question of what is customary to provide. Here is a charter-party with some stipulations and Mr. Brown claims that

they are to be construed with reference to a known and existing custom in the port of New York, and he asks you what that custom is. He picks out the 4th subdivision and says, "How does custom construe that 4th subdivision?"—not how you would construe it or Mr. Brown, but how does the practice of merchants construe it?

A. I understand that custom requires that vessel to go to Arbuckles' refinery and there deliver her cargo of sugar providing there is sufficient water for her to float into that berth and lie there at all times afloat.

Q. That is the way custom would always, as far as you know, construe that clause?

A. Yes, sir.

By Mr. BROWN:

Q. This clause has to do with who shall pay lighterage. I should like to have you state whether there is any custom as to who should pay lighterage interpreting this particular clause, if there is any custom.

Objected to. Objection overruled.

A. If there is no lighterage necessary——

By the COURT:

Q. Supposing there is lighterage necessary who shall pay it?

By Mr. BROWN:

Q. The question is whether this clause compels the charterer to pay lighterage under all circumstances where lighterage is necessary?

A. I don't see the necessity of the lighterage.

75 By the COURT:

Q. Supposing there is a necessity for it who is to pay the lighterage?

A. If the ship had performed her duty and after that there was a necessity for it the charterer would have to pay it.

Q. Now, the question is, is there any custom that determines what the duty of the ship is under that clause; not any other clause but that clause.

Mr. BROWN: I think the witness has given a satisfactory answer.

The COURT: Very well, I withdraw my question.

Cross-examined by counsel for libellant.

By Mr. KIRLIN:

Q. I understood you to say that the lighterage clause is not always in this form?

A. No, sir.

Q. Let me ask you whether these words which I am now going to read to you are not unusual in a lighterage clause, to wit, "light-

erage to reach the port of destination or deliver the cargo at port of destination" and the words, "any custom of the port to the contrary notwithstanding." Are not those two phrases unusual in lighterage clauses?

A. Well, I consider that they are somewhat unusual, yes, sir.

Q. Did you not in your direct examination in substance give the usual form in which a lighterage clause is found namely, "lighterage, if any, to be paid by the cargo"? Isn't that the usual form in which it is found?

A. By charterers I said.

Q. By charterers?

A. Yes, sir.

Q. And the words, "any custom of the port to the contrary notwithstanding," is an unusual provision, is it not?

A. I am inclined to think that it is rather unusual, yes, sir.

Q. Now, you gave us a definition of your opinion about clause 4 in one form; let me put the converse of it to you. Supposing the ship has performed her duty under the charter-party and notwithstanding such performance lighterage must be paid, wouldn't the custom as you understand it require that lighterage in such case be paid by the charterers?

76

Objected to on the ground that it does not conform to the facts.

A. Of course my view is if she had performed her duty no lighterage would be necessary.

Q. Yes, but leave that out. Supposing you are wrong about that. Suppose, notwithstanding the performance of her duty—she has performed it—and there is still lighterage to pay, wouldn't the charterers under that clause by custom have to pay the lighterage?

Objected to as irrelevant. Objection overruled.

A. If she had performed her full duty and there still was lighterage to pay the charterer would have to pay it, yes, sir.

Q. That mast that you referred to as having been cut, was a wooden mast, wasn't it?

A. No, sir, it was a steel mast.

Q. How much did they cut off?

A. I am not able to say distinctly.

PIERRE J. SMITH, being duly sworn and examined as a witness for the respondents, testifies:

By Mr. BROWN:

Q. What is your business?

A. General agent and commission merchant, principally in sugar, hemp, coffee and spice.

Q. What is the name of your firm? Are you a member of the firm?

A. Yes, sir; Smith & Shipper.

Q. Do you act as ship's agents?

A. No.

Q. How long have you been in the shipping business?
A. Mercantile business.
77 Q. Just what is your mercantile business? What do you have to do with ships?
A. We receive cargoes.
Q. You are consignees of ships, are you?
A. Yes, sir.
Q. How long have you been in that business?
A. About 20 years.
Q. Have you had considerable experience with charter-parties?
A. Yes.
Q. Are you familiar with this form of charter that I show you?
A. Yes.
Q. How long have the two clauses with respect to the vessel proceeding to the port of discharge or so near thereto as she can safely get and deliver the cargo at such dock as directed by the charterers, and clause No. 4, been in common use?
A. Those clauses or similar I consider have always been in common use during my experience.

By the COURT:

Q. It is not a question of similarity unless you mean by that identity of language. The question is how long have those clauses as they stand there?
A. I can only say similar clauses because nearly every ship broker's phraseology is different from others but they generally have the same meaning on clauses of that kind.

By Mr. BROWN:

Q. What difference in language has there been?
A. That I couldn't say exactly.
Q. Do you know this exact phraseology was ever used before?
A. I have seen it, yes, sir.
Q. How many times have you seen it?
A. I couldn't say how many.
Q. During what period?
A. During the last 20 years we have had several hundred vessels coming to us and I couldn't tell you how many.
Q. In similar clauses what divergence would there be? Do you mean only the matter of an omission of an article or preposition, or what?
A. It might be as Mr. Snow said, simply say lighterage would be for account of the cargo, or it might be as this.
78 Q. That would be substantially a different clause. I am asking about this clause. Is this clause a common clause as it stands?
A. Yes, sir.
Q. What construction by custom, if any, have these two clauses received as far as you know?

Objected to.

A. In New York? The one about lighterage?

Q. The one about the lighterage and the one about the designation of the dock by charterers?

A. I have always considered the custom in New York was for the vessel to discharge anywhere in the port of New York where she can safely lie afloat either above or below the bridge unless stipulated especially in the charter the vessel was not to go above the bridge.

Q. Is it sometimes so stipulated?

A. Yes.

Q. With reference to the lighterage clause?

A. The lighterage clause I consider only refers to depth of water.

Q. I don't want your opinion. Is there a custom?

A. Yes sir.

Q. What is the custom?

A. That the vessel if ordered to a dock like Matthiessen & Weeks' refinery, where there is not sufficient water to lie afloat, that either sufficient cargo is taken out and lightered at the cargo's expense or all the cargo.

Q. The lighterage clause then applies to that kind of case?

A. Yes.

Q. Any other kind that you know of?

A. It only refers to depth of water as far as I know.

Q. What is the condition of water at Arbuckles' refinery?

A. The largest vessels go there.

Q. Can you say whether it is a usual and customary place to discharge sugar?

A. Yes.

Q. How much of the sugar arriving in this port on vessels is discharged above the bridge?

A. Over 75%.

Q. Do you know how many vessels there are with masts in one piece too high to go under the bridge?

A. I do not.

79 Cross-examined by counsel for libellant.

By Mr. KIRLIN:

Q. What experience have you had to impress upon your mind that clause 4 with respect to the lighterage as it stands in this charter-party is a common clause?

A. The experience of about eighteen years.

Q. I know your general experience, but I want to know your experience with this clause as it stands here, in this identical form?

A. We have received sugars from the Philippines, Java and Brazil and I have never known that clause to mean anything else.

Q. That is not the question. I want to know what experience you have with this clause in this identical form?

A. I say we have had that experience, we have had questions arising all the time about vessels going to different places.

Q. You know that the general form in which the lighterage clause

is found in sugar charter-parties is substantially in these words, to wit, "lighterage, if any, to be paid by charterers," don't you?

A. Yes.

Q. That is right.

A. In our experience——

Q. Wait a moment. Let me ask the question. Look at the clause you have before you there.

A. Clause 4?

Q. Yes. Are not the words, "or deliver the cargo at port of destination," an unusual phrase in a lighterage clause?

A. I should say not.

Q. Are not the words, "any custom of the port to the contrary notwithstanding," an unusual phrase in a lighterage clause?

A. No, I should say not.

Q. You say they generally have both of those?

A. As a rule, or similar clauses meaning the same thing.

Q. I didn't ask you that.

A. Well, I answer to the best of my ability.

Q. (Read to the witness.) Are not the words, "any custom of the port to the contrary notwithstanding," an unusual phrase in a lighterage clause?

A. I say no, or similar phrases.

Q. What have you got in mind? You are talking about
80 a similar phrase. What is a similar phrase such as you are familiar with?

A. Lighterage, if any, for account of the cargo.

Q. That is the usual form?

A. That is quite usual.

By the COURT:

Q. You think that is similar to this?

A. Similar in meaning as far as the custom of the port of New York.

By Mr. KIRLIN:

Q. That is what you mean when you say that is a usual clause?

A. This or similar clauses.

Q. That is, clauses like the other one which you say has the same meaning as this?

A. Yes, in the port of New York.

Q. Isn't the fact that most of the sugar companies being above the bridge is due to the fact that the trust refineries are above there and the anti-trust refineries?

A. It is due to the fact that most refineries are above the bridge.

Q. Let me ask you this question: Where the ship has performed her full duty under the charter-party, and notwithstanding that fact lighterage must be paid, and the charter-party contains a lighterage clause in the form of clause 4, or what you call a similar form, is it not for the cargo under the custom of this port to pay the lighterage?

A. Not as regards going above the bridge. In such case the vessel must pay the lighterage.

Q. That leaves the question whether she must go above the bridge or not as a legal duty. (Question read to the witness.) Where the ship has performed her full duty under the charter-party, and notwithstanding that fact lighterage must be paid and the charter-party contains a lighterage clause in the form of clause 4, or what you call a similar form, is it not for the cargo under the custom of this port to pay the lighterage?

A. As far as New York in every case——

Q. Is it or isn't it, is what I am asking?

81 Mr. BROWN: I think the witness should be given an opportunity to answer the question.

The WITNESS: I should like to have it read once more.

Q. (Read to the witness.) Where the ship has performed her full duty under the charter-party, and notwithstanding that fact lighterage must be paid, and the charter-party contains a lighterage clause in the form of clause 4, or what you will call a similar form, is it not for the cargo under the custom of this port to pay the lighterage?

A. Not for lighterage above the bridge unless positively stated in the charter-party.

Q. Won't you please answer the question I put to you and not answer some other question. (Question read to the witness.) Where the ship has performed her full duty under the charter-party, and notwithstanding that fact lighterage must be paid and the charter-party contains a lighterage clause in the form of clause 4, or what you call a similar form, is it not for the cargo under the custom of this port to pay the lighterage?

A. Yes, if there isn't sufficient water where the vessel is ordered for the vessel to lie afloat.

Mr. KIRLIN: May I ask your honor to instruct the witness to answer.

The COURT: I don't think there is any necessity.

Redirect by counsel for respondents:

Q. How long has the bulk of the sugar cargoes been discharged above the bridge?

A. Always in my experience.

Q. Are these identical words in clause 4 common or not?

A. Yes.

By the COURT:

Q. Can you recollect any ship that ever came to your care where those words occurred in the charter-party?

82 A. I only remember the general Java charters, and reading them I considered, as I said before, that they were similar clauses.

Q. Now you see the difficulty is that what you might regard as

similar the lawyers are quarreling about. You think that the form that you gave to Mr. Kirlin a few moments ago means the same thing as this. The real question we want to know here is whether you are familiar with charters where those words appear just as they are there, letter for letter and word for word?

A. Not letter for letter or word for word in any charter. I couldn't swear letter for letter or word for word.

Q. To rather clear up your views in this matter, have you ever known, in the first place, a case where the cargo was deliverable above the bridge and yet the ship did not go there to deliver it but the cargo was lightered?

A. Where the vessel did not go?

Q. Did you ever know a case where the cargo was lightered below the bridge because of the ship's alleged inability to go above the bridge?

A. I have known vessels to refuse to go but finally went.

Q. Did you ever know of a case where the cargo was lightered because the ship refused, properly or improperly, to go above the bridge?

A. I never knew a vessel in our experience that didn't go above the bridge.

Q. Then you never knew of the cargo being lightered under the circumstances that I have stated and under the circumstances that arose here? Here is a ship that comes to the bridge, she says the masts are too high to go under the bridge and, therefore, the cargo was lightered. In your experience did you ever hear of such a case before?

A. I never knew of a cargo being lightered on account of a similar case.

Q. Therefore, you don't know of any custom with regard to it, do you?

A. The custom is to go above the bridge.

Q. Did you ever know a case like this here where the cargo has not gone above the bridge on account of pretended inability to go there?

A. Not personally.

Q. Then in all cases where the matter has come up with reference to you the ship has claimed first it could not go under the bridge and finally has gone under the bridge?

A. Yes.

83 By Mr. BROWN:

Q. In those cases how has the vessel managed to go under the bridge?

A. Taken down her topmast.

Q. Have you ever known a case of an outward-bound ship which has had her cargo lightered above the bridge before going below the bridge?

Objected. Objection sustained.

By the COURT:

Q. Have you ever known a case where the topmast, or whatever the mast was, couldn't be lowered? Suppose it was a permanent mast, have you ever known it to be cut off?

A. No vessels that ever came to us.

Q. Have you ever heard of any instances—I mean is there any custom with reference to those cases?

A. The custom is that the vessel must go above the bridge and deliver her cargo unless positively stated——

Q. No. Is there any custom with reference to a ship that comes to this port whose mast is so high that she can't go under the bridge and it is a permanent mast?

A. I consider this is the custom.

Q. Did you ever know such an instance of a mast being too high to go under the bridge and yet the mast being permanent so it couldn't be lowered?

A. Mr. Snow just mentioned one; that is the first one I heard of.

Q. That you ever knew or heard of before?

A. Yes, sir.

ARTHUR C. ELLIOT, being duly sworn and examined as a witness for the respondent, testifies:

By Mr. BROWN:

Q. What is your business?

A. Ship broker.

Q. What house?

A. John R. Livermore.

Q. What is your relation with that house?

A. Clerk there.

84 Q. How long have you been there?

A. In that house? Ten years.

Q. How long has your shipping business extended over?

A. About 20 years.

Q. Does the firm of John R. Livermore & Co. act as ships' agents?

A. They do.

Q. Have you had some experience with charter-parties of vessels?

A. I have.

Q. During how long a time?

A. 20 years.

Q. Please say whether the charter-party I show you is upon a usual form?

A. I think it is.

Q. Please take particular notice of the two clauses, one with respect to naming of charterers of the dock of discharge and the other with respect to lighterage, the latter being clause No. 4, and say whether those two clauses are usual?

A. The first clause is quite customary.

Q. How about the second, clause 4?

A. I can't say positively whether I have seen the identical clause or not.

Q. Are similar clauses in common use, if so, how similar?

A. Generally lighterage, if any, to be at the expense and risk of cargo, or at charterers' expense.

Q. You don't know whether you have seen this precise form or not?

A. I don't recall whether I have or not.

Q. Is there any custom as to whether or not a vessel chartered under that form of charter is bound to deliver cargo above the bridge where she is unable by reason of the height of her mast to pass under the bridge?

Objected to on the ground that the witness has already stated such facts as to make the question unfair. Objection sustained.

Q. I mean purely as the effect of the requirement that the charterer may send the vessel to whatsoever dock he may designate?

A. Then you refer to the first clause?

Q. Exclusively.

A. The custom is the charterer has a right to order the ship to a safe dock to discharge the cargo.

85 Q. And if she can't get there?

A. I never had that question come up—if she can't get there.

Q. Have you had experience with vessels whose masts were too tall to go under the bridge?

A. As they stood, yes.

Q. What has that experience been?

A. Some of them I have had to strike the topgallant-mast and some I have had to cut the jigger-mast.

Q. You have represented the vessels in those cases?

A. I have.

Q. You don't remember a case in which the mast had to be cut?

A. I remember a case where I have had to cut the jigger-mast.

Q. That was the mizzen-mast?

A. Jigger-mast.

Q. What is that mast?

A. The jigger-mast is the fourth mast, as you call it, the last mast.

Q. In that case was the jigger-mast the tallest of the masts?

A. No.

Q. Why did it have to be cut?

A. Because it was not in one piece.

Q. The topmast and the other masts were housed, were they?

A. The topgallant-masts were housed.

Q. Has that happened more than once you have cut the jigger-mast?

Objected to.

A. I have had that happen to me, I think, three times, but I don't recall just now the name of more than one vessel that I had to do it.

Q. How serious an injury to the vessel would it be where the mast is 140 feet high to cut off the mast five feet?

Objected to.

A. That I don't know; I have never had the experience.

Q. How much of the mizzen-mast of these three vessels that you do recall was cut off?

—. I didn't cut any off of the mizzen-mast.

Q. I mean jigger-mast, excuse me.

A. About 10 feet.

86 Q. In each case?

A. I think about 10 feet; yes.

Q. In each of the three cases?

A. In each case; yes, sir.

Q. What can you say as to whether or not a vessel drawing 22 feet can reach Arbuckles' refinery by passing through the Sound and Hell Gate?

Objected to as immaterial. Objection overruled.

A. Never having had a vessel come that way I can't say anything about it.

Q. Do you know whether there is water enough?

A. I don't know of my absolute knowledge, no.

Q. Are the heights of the masts of vessels in Lloyds Register?

A. No, sir.

Q. Are they commonly known to the trade?

A. No.

Q. Do you know how many vessels have masts in one piece too high to go under the bridge?

A. I do not.

Q. Can you say whether many or few?

A. Do you mean of my personal experience?

Q. From your personal knowledge.

A. From my personal knowledge it is only those vessels that I have come in contact with. I have never had one.

Q. Answer to the fact of those three vessels you have just testified to.

A. I am speaking there of the jigger-mast; that occurs only in a four-masted vessel.

Q. I am speaking now of all vessels. You know three instances of your own experience, do you not, where vessels have had masts in one piece too high to go under the bridge?

A. Yes.

Q. Do you know, as a shipping man, how many vessels exist altogether in all the world having masts too high to go under the bridge in one piece?

A. No, sir.

Cross-examined by counsel for libellant.

By Mr. KIRLIN:

Q. Isn't the phrase in clause 4, "any custom of the port to the contrary notwithstanding," unusual in a lighterage clause?

A. That I can't say, Mr. Kirlin, because I have never had any argument on it.

87 Q. I want to call your attention to the fact too that this clause says that "lighterage, if any, to reach the port of destination, or deliver the cargo at the port of destination remains for account of the receiver," and so forth. Isn't that alternative unusual in a lighterage clause?

A. That I can't say, because I have never had experience with the clause; personal experience with the clause I mean.

Q. It has been unusual in your experience?

A. I have never had the experience; I have never had the question arise, therefore I have never had the experience.

Q. Can you say whether it is usual or unusual for heavy-draft vessels coming from Java, sailing vessels with cargoes, to come by way of Hell Gate?

A. Never heard of one coming that way.

By the COURT:

Q. Do you remember any of the cases where the jigger-mast was cut what form of the charter was, or how it came up? In the first place, at whose expense was it cut, do you recall?

A. The ship's.

Q. You were insisting then it was the duty of the ship to go above the bridge in that case?

A. She is bound to go if she can.

Q. You insisted on that in this case?

A. Yes, sir.

Mr. BROWN: This witness was the agent of the vessel, if your honor please.

Q. Do you remember anything about the form of the charter in those cases?

A. I can't say.

Q. Was there any contention about it? I mean did the matter come up so that you examined the charter on each side?

A. We simply examine the charter to see whether the merchants, the receiver of cargo, has the right to order the ship. As he had the right in one specific case I have in mind, to order the ship to any berth, he ordered her to go above the Brooklyn bridge. We were bound to go there if we could and we cut the jigger-mast.

88 Q. Was there any controver-y about it at all?

A. Not the slightest.

Q. So the matter didn't come up as to whether there was any contest of rights at all?

A. No, sir.

Q. Even in conversation?

A. No, sir.

Q. There has been some talk about custom here. Has it been a matter of controversy as to whether a ship with a standing permanent mast should be obliged to cut it in order to go above the bridge; has it been talked about I mean?

A. Permanent mast? No, I have never heard of it.

Q. It has not been a matter that gentlemen engaged in the shipping trade have talked over?
A. No, I have never heard of it.

Redirect by counsel for respondents.

By Mr. BROWN:

Q. In the particular case you have referred to cutting the jiggermast, do you remember what the clause was with respect to the designation of the dock of discharge as compared to the present clause you have in your hand?
A. The verbiage wasn't the same, nothing was the same. The charterer had a right to order the ship to a safe dock where she could lie afloat and there discharge the cargo.
Q. You don't think there was any substantial difference then?
A. I don't think there was.

By the COURT:

Q. Was anything corresponding to that fourth subdivision?
A. Corresponding to it, yes. There was a question of lighterage.
Q. How did that read in your charter-party?
A. "Lighterage, if any, to be at the risk and expense of the cargo."

Recross by counsel for libellant.

By Mr. KIRLIN:

Q. It is a fact, is it not, that your office is the prin-
89 cipal agent of sailing vessels, that is, that you represent most of the sailing vessels that come to this port, large sailing vessels, foreign?
A. I couldn't say that. We have our share of them.
Q. It is a very large agency for sailing vessels?
A. Fairly good; yes, sir.
Q. Isn't it very large as compared with the others?
A. That I couldn't answer without comparing tonnage for tonnage.

CHARLES F. BROOKS, being duly sworn and examined as a witness for the respondent, testifies:

By Mr. BROWN:

Q. What is your business?
A. I have the management of several concerns, taking charge of their vessels' cargoes, and so forth, as they arrive; attending to the delivery and receipts, and so forth; placing the ships when they do arrive, and so forth.
Q. You act as ships' agents, do you?
A. Not entirely so; partially.
Q. How long have you been in that business?
A. 49 years.
Q. Are you familiar with charter-parties?
A. Partially. I have seen a great many and handled a great

many. I have had ships of my own under charter, and so forth, and so forth.

Q. Is the form of charter of the *Benlarig* which you hold in your hand a common one or not?

A. I have looked over this charter and I think it is a common, ordinary charter.

Q. The two clauses that are here in dispute, one giving the charterer the right to designate the port of discharge, and the lighterage clause are common clauses?

A. The charters that we have we have it explicitly understood that we have a right to order the ship where we please.

Q. You say the charter that you use?

A. Yes, sir.

90 Q. Is that the same as this charter?

A. No, it has not got the usual clause in.

Q. What clause?

A. Of going above the bridge if we require it.

Q. How does the clause read?

A. "Charterers have the right to order the ship above the Brooklyn bridge, they paying the expense thereof."

By the COURT:

Q. Who paying the expense?

A. The charterers.

Q. They paying the expense of what?

A. That is striking the topmast or topgallant-mast as the case may be.

By Mr. BROWN:

Q. Does that clause of yours modify the custom that would otherwise exist without it, or not?

The COURT: It is better for the witness to state what custom exists.

Q. Irrespective of this peculiar clause of yours that you refer to what is the custom, if any, as to the paying of the expense of housing the topmast or topgallant-mast going above the bridge?

A. I have made contract with the captains for so much money to go above the bridge.

Q. Is it an expense chargeable to the vessel or charterer?

A. The charterer, where it is in the charter-party.

Q. My question is where it is not in the charter-party, where nothing is said in the charter-party about it.

A. Then it is the custom of the ship to go above the bridge, that is, providing the charterer has, as in this charter, the privilege of naming the berth.

Q. And the expense of housing the topgallant-mast?

A. Is at the ship's account.

Q. Is the clause in the charter-party, the first one, common or not in your experience?

A. I should think it was a common clause; I should think it was.

91 Q. What is the effect of it as construed by custom in respect of the delivery of cargo above the bridge where the vessel has too tall masts to go under the bridge?

A. That depends entirely on the charter.

Q. I am speaking of that clause.

A. I should think she would be obliged to go above the bridge.

Q. Is there any construction by custom, if you know, not what you think?

A. I have never had anything of that kind come up.

Q. You are not sure whether there is a custom or not?

A. No, I am not sure.

Q. About the lighterage clause, how common is that?

A. I have never had a case in this port; I have in Boston and Salem, but not in New York.

Q. Do you mean a case where there was controversy over the clause?

A. No; where a ship couldn't reach her dock in Salem I have lightered the cargo and taken sufficient out of the ship to enable her to go to the dock.

Q. On what account was that? A. On account of the draft of water?

A. Yes; she couldn't go there.

Q. Is this particular clause a common clause in charters, so far as your experience goes—clause 4 I mean?

A. I should think it was.

Q. Do you know any construction it has received by custom or any interpretation?

A. No.

Q. Clause 4; please look at it.

A. I don't think so.

Q. Do you know of any cases of vessels entering this port and having masts too high to go under the bridge?

A. I do.

Q. Have such cases arisen where the charter-party was similar to this?

A. Yes, we had one case. The *Trade Wind*——

Objected to as to specific instances.

The COURT: I will hear what he has to say about it.

Q. State what happened in this case.

A. The *Trade Wind* arrived and it was in the charter that

92 the charterer should pay the expense of lowering her masts if they wished to go above the bridge. She had a jigger-mast which was, I think, about 7 or 8 feet higher than customary, and she couldn't proceed under the bridge. The captain said to me, he told me he wouldn't go under the bridge. I said, "There is your orders, Captain, you can do as you please;" he said, "I have to cut my jigger-mast;" I told him I didn't care anything about that, if he had to cut his ship in two, we had a right to send him

above the bridge. He went away and took counsel, as I understand in the matter, and the first thing I knew he had cut his jigger-mast and went above the bridge.

By the COURT:

Q. There you had a stipulation to that effect in your charter?
A. That we was to pay the expense of lowering the masts, but nothing about cutting the jigger-mast.

By Mr. BROWN:

Q. At whose expense was the cutting of the jigger-mast done?
A. The captain cut it himself.
Q. What is a common height for the masts of sailing vessels?
A. Oh, they run from about 160 to 170; 135, 140, 150, 160 and 170 feet.
Q. From 135 to 170 feet?
A. Yes.
Q. Is it common to have masts of 140 or 145 feet above the water?
A. Quite common.
Q. How many instances do you know?
A. Oh, I know a great many.
Q. Of masts 140 or 145 feet above the water?
A. Yes, sir.
Q. Are those cases where the masts have been one piece?
A. The masts are never in one piece except the jigger-mast; the topgallant-mast, the topmast, royal masts are all generally, with the exception of the royal mast and topgallant-mast, they are in odd pieces.

93 Q. How many cases do you know of in which a vessel has had masts so constructed as not to be able to go under the bridge without cutting the top of them?

A. Never knew of a ship.
Q. How many ships have you known about?
A. I have known ships all my life; been in them, know them, sailed them all my life.
Q. With how many have you had experience?
A. Hundreds of thousands. They are all so constructed they can lower it.
Q. The question wasn't how many instances you had known of cutting masts, but how many you had known where they were so high they would have to be cut to go under the bridge?
A. I never knew of a case except jigger-masts, because they could all be lowered.
Q. How many cases have you known of jigger-masts that had to be cut in order to go under the bridge?
A. I don't think I have known but one.

Cross-examined by counsel for libellant.

By Mr. KIRLIN:

Q. Ralli Brothers have regular printed parties, do they not?

A. I haven't referred to them at all; I don't say anything about Ralli Brothers.

Q. You said your charterers had a special clause about going above the bridge, didn't you?

A. Yes. I didn't say Ralli Brothers, though.

Q. Whose did you say?

A. I didn't say any one.

Q. Ralli Brothers' charterers have such a clause?

A. I have seen it.

Q. Is it in these words?

A. I don't recollect.

Q. You haven't heard the words yet?

A. I know, but I couldn't recollect if you read them to me.

Q. Let me try it. "If ship ordered to New York not to be discharged above the Brooklyn bridge unless charterers pay the usual extra expenses." Is that about the form of it?

A. I don't recollect.

Q. Isn't the provision in Ralli's charter-party with regard to the right to furnish a berth——

A. I don't think you ought to ask me any questions of that kind relative to their business.

94 Q. —in these words, "charterers having the liberty of naming the dock or other place for discharge"?

A. I don't think you ought to ask me those questions relative to Ralli Brothers' business.

By the COURT:

Q. Why not?

A. I don't see how they come in the case at all.

Q. What relation have you to Ralli Brothers?

A. I have done their business for 40 years—their outdoor business.

Q. Is there anything secret about the stipulation in their charter-parties?

A. Not that I know of.

Q. Then what harm does it do in pursuit of the truth?

A. I feel little delicate about it.

Q. Have any of your answers been founded in whole or in part on the Ralli Brothers' charter?

A. Not entirely.

Q. Have they *had* been to any extent?

A. To any extent; yes sir.

Q. If they have to some extent, then why, if you have given that information here, shouldn't counsel have a right to ask you specifically about those charters as long as no particular harm is done?

A. No particular harm, no; no secret or anything about it.

Q. Of course, if you don't recall how it is, you can say so. (Question read to the witness.) Isn't the provision in Ralli charter-party with regard to their right to furnish a berth in these words: "Charterers having the liberty of naming the dock or other place for discharge."

A. Yes.

Q. Do you consider that the equivalent in import to the first clause to which your attention was directed in the charter-party of the *Benlarig?*

A. What is the first clause there?

Q. "Vessel to discharge at New York or Boston or Philadelphia or Baltimore, or so near the port of discharge as she may safely get, and deliver the same always afloat, in customary place and manner at such dock as directed by charterers agreeably to bills of lading."

A. Yes, sir, that is right

95 Q. You do consider those to be of similar import, do you?

A. I do.

Q. You spoke of masts being higher than the customary height to go under the bridge. What is the customary height of mast that is understood to be possible to send under the bridge?

A. What is the customary height of a mast? It depends entirely upon the tonnage of the ship.

Q. You said something in your direct examination about there being some customary height, or some height at which it was understood a vessel could go under the bridge?

A. Not always, no; some ships may go under by striking the top-gallant-mast.

Q. Do you know how much room there is under the bridge for the masts to pass?

A. What is the height of the mast?

Q. It is the height of the bridge, isn't it?

A. No, the height of the bridge is 135 feet.

Q. Above what?

A. Above high water.

Q. Who told you that?

A. Oh, I think I have read it somewheres.

By the COURT:

Q. There has been some testimony about custom here of ships going above the bridge. Has there been any discussion of this matter in the trade as to the right to order the ship above the bridge where the mast was too high to go and was a permanent mast?

A. A custom?

Q. Has there been any discussion about that in the trade?

A. Not that I know of.

Q. Your consideration of it was limited to that particular instance that you had?

A. Yes, sir. You see most of these ships are known; they are known abroad; they are known all over, and they know the height of the mast and whether they can make a charter to come to New York safe; and if it is not in the charter it seems to me that the broker or owners or whoever chartered that ship took the advantage; they knew that the ship couldn't go above the bridge just as well as I did.

96 Q. You can see the situation here: Here is a charter of a particular form, and counsel, for the purpose of showing what you gentlemen do in business and in practice, asks what

the custom of the trade is with reference to ordering a ship above the bridge when she has a permanent mast and the mast is too high to go under the bridge. Now, I judge from what Mr. Smith has said, and others, and from what you say, that that matter has not been discussed in the trade?

A. No, I don't think it has. I know what I would do if I had a ship like that.

FRANK MACKAY, being duly sworn and examined as a witness for the respondent, testifies:

By Mr. BROWN:

Q. What is your business?

A. Ship broker; steam principally.

Q. How long have you been in that business?

A. Fourteen years.

Q. With whom are you connected?

A. Barber & Co.

Q. What is your position with them?

A. Chartering clerk and little of everything.

Q. Are you familiar with the charter of the *Benlarig?*

A. I have seen this charter more on the other side than I have here. I haven't had much experience here.

Q. Do you mean in England?

A. I mean in England.

Q. Do you know whether it is, or is not, a common form of charter in the sugar trade?

A. Yes, sir; I should think so.

Q. Do you know?

A. Of what I have seen, yes.

Q. Do you know whether the two clauses here under discussion are common clauses or not, to wit, the charter giving to the charterer the right to designate the dock of discharge and the lighterage clause, No. 4?

A. I should say so, in a sugar charter.

Q. Have you had experience with those clauses before?

A. Not on this side, no.

Q. Have you anywhere?

A. In England I have several times.

Q. How long have you been in this country?

A. Five years.

97 Q. Have you noticed those clauses since you have been here?

A. We have not had a vessel with sugar in, a sailing vessel.

Q. Do you know anything about any custom with respect to the interpretation of such clauses here in New York?

A. As far as steamers, yes.

Q. With respect of steamers, what is the custom?

Objected to.

Q. Do steamers ever have masts high enough to interfere with going under the bridge?

A. I haven't heard of it; they may have.

Q. Do you know about any custom with respect to whether vessels do discharge above the bridge where their masts are too high to go there?

A. Yes. As far as sailing vessels loading outwards.

Q. What do you know about any such custom as that?

Objected to.

Objection sustained. Respondent excepts.

Q. If a vessel is loading outward, what kind of a clause would that arise under?

Objected to.

Objection sustained. Respondent excepts.

Q. Do you know anything about the construction by custom of the lighterage clause in the port of New York?

Objected to, that the witness says he has not had any cases.

A. The lighterage clause such as is in this charter?

Q. Do you know anything about any custom of construing that custom in the port of New York?

A. Yes. It means if the vessel has to go to the wharf ordered by the charterers, and if she can't get there on account of want of water, she is to discharge till she gets a certain draft to allow her to go up there.

98 Q. Do you mean that clause is called into force only where the vessel cannot reach her dock because of the draft of water?

Objected to as leading.

A. Yes, sir, I should.

By the COURT:

Q. Whatever other thing stood in the way the ship would have to bear the expense of the lighterage, would she? Supposing there was an impassable bridge—did you ever hear of that, or any other obstruction of navigation so that the ship couldn't get to the dock to which she was ordered. Which then would bear the lighterage, the ship or the cargo?

A. I don't think I have had sufficient experience to answer that question. I mean to say, no such cases ever occurred to my knowledge, no, sir, where a steamer couldn't get to her berth.

Q. Here is the case of the Brooklyn bridge. Did you ever know of the question to come up with reference to a permanent mast?

A. On a steamer? No.

Cross-examined by counsel for libellant.

By Mr. KIRLIN:

Q. Suppose there was a bar under the Brooklyn bridge upon which there was only 6 feet of water and this ship, drawing 21 feet, under this form of charter had been ordered to discharge her cargo above the bridge. Look at clause 4 particularly and in connection with that the clause about the charter having a right to appoint the dock and say whether by the custom, as you understand it, the ship would have to pay the lighterage of taking that cargo up to the appointed place above the bridge?

Objected to as immaterial and irrelevant.
Objection overruled.

A. I should say that the charterer would have to pay unless the vessel gets beyond the bridge in some other way, practical way. I shouldn't certainly do so.

99 Redirect by counsel for respondents.

By Mr. BROWN:

Q. Could the vessel get to the East river beyond the bridge in some other way?
A. Yes, sir. Vessels have got to berths the other side of the bridge but not after they have been once in New York, in the harbor of New York.
Q. Could they do so or not?
A. Certainly they could.
Q. What draft of vessel could come through the Sound?
A. That I wouldn't like to say. We have steamers.
Q. How large have you known of?
A. A steamer drawing about 18 feet.
Q. You have no knowledge of any custom with respect to sailing vessels? Is that correct?
A. No.

JOHN GILMOUR, being duly sworn and examined as a witness for the respondents, testifies:

By Mr. BROWN:

Q. What is your position and occupation?
A. Sugar-buyer for the firm of Arbuckle Brothers.
Q. They were receivers of cargo in this case?
A. We were the receivers of this cargo.
Q. How long have you been in their employ?
A. One year and nine months.
Q. How much experience have you had with sugar cargoes?
A. About ten years in the port of New York.
Q. With whom were you before you were with Arbuckles?
A. The late Ira Bursley.
Q. What did you have to do with the *Benlarig* case?

A. I had the purchasing of the cargo and the delivering of it at the refinery which included the ordering of the ship.

Q. Do you know in what manner and at what expense the sugar reached its destination from the vessel?

A. By lighter.

100 Q. At what expense?

A. Fourteen hundred and some odd dollars. I don't exactly remember the exact figure; you have it there. It is the amount in contest here.

Q. Have you verified that amount?

A. Yes, I have the bill here. (Referring to the bill.) $1,466.12.

Q. Do you know that that amount was paid?

A. Yes, sir.

Q. What can you say as to whether or not it is a reasonable sum to be paid for such work?

A. It is an unusually low rate.

Q. When was the lighterage paid?

A. The date of payment is not put on the bill here.

Q. Do you know when the lighterage was paid?

A. Not except I refer to the books in the office.

Q. What part of the sugar arriving in this port in vessels goes to docks above the bridge?

A. 75 to 85%, I should say.

By the COURT:

Q. How long has that been the case?

A. It has always been the case that the bulk of the sugar has gone above the bridge because Havemeyer & Elder's house, which is the oldest refinery among the recent refineries, has always been above the bridge and they have always done the largest business.

Q. Do you mean for a period of 10 or 15 years?

A. Since that refinery was built.

Q. How long ago was that?

A. I don't know. I am only in this country ten years, it was built before I came here.

Q. Do you know what the height of the masts of sailing vessels usually is?

A. It varies according to the tonnage of the vessel.

Q. What is the practical maximum for permanent masts that cannot be moved?

A. I would say about 140 feet or around that way.

Q. How many vessels have masts too high to go under the bridge without cutting?

A. I couldn't say. There must be very few. It is only in

101 very recent years that vessels have been built with steel masts in one piece.

Q. How recent?

A. The last ten years I should think.

Q. How many sailing vessels have you had to do with carrying cargoes of sugar to this port?

A. I couldn't give you the exact quantity but they have been quite numerous.

Q. Can you give me some idea?

A. Do you mean in my whole experience in the port of New York?

Q. Yes.

A. Oh, I would say 30 or 40; that is, I have received full cargoes, 30 or 40 full cargoes myself in this port.

Q. Can you state a little more exactly how unusual it is for vessels to have too high masts to go under the bridge without cutting?

A. For the simple reason that it is a very recent thing for vessels to be built that way.

Q. Are there a great many of them?

A. No, I don't think there is more than a dozen of them altogether of the entire fleet afloat.

Q. Do you know how much it would have cost to convey the sugar from Atlantic dock where the vessel discharged to your refinery by drays?

A. I haven't the slightest idea. A very great deal more than by lightering it.

Mr. KIRLIN: I shall not contradict Mr. Gilmour's testimony if he says the charge was reasonable.

The WITNESS: The lighterage is a reasonable charge.

Q. Are you able to testify positively that the drays would cost more?

The COURT: What is the consequence of that?

Mr. BROWN: I want to justify his sending it by lighters.

Mr. KIRLIN: I don't find any fault that it went by lighters instead of by drays, nor with the charge either.

102 Q. When does a dock have to be designated by charterers under the provisions of such a charter-party as this?

A. Within 48 hours after the arrival of a sailing vessel in port and 24 hours after the arrival of a steamer—that is the custom.

Q. Has it anything to do with notice of readiness?

A. Yes. It dates from the time the ship notifies the receiver of the cargo she is ready to proceed to a dock to discharge.

Q. Is the height of a vessel's mast in Lloyds Register?

A. It is not.

Q. Is there any way of finding out the height of her mast, in the trade?

A. None, except by getting into communication with the owner.

Q. Do you know whether it would have been possible for the *Benlarig* to reach your refinery by way of the Sound and Hell Gate?

A. I know that it would. I can't state so in my own personal experience; I know that it would because I know that large steamers come through Hell Gate.

Q. How large?

A. Up to two or thee thousand tons net register I should say. It

is safer for a vessel to come through Hell Gate with a full cargo than it is without one.

Q. Are you familiar with the form of charter of the *Bendrig?*

A. Very.

Q. How much experience have you had with that form?

A. Oh, probably 90% of all the Java charters we have had contain that clause.

Q. Contain which clause?

A. Both the first clause, No. 1, and paragraph No. 4. Word for word.

Q. To how many charters does your answer apply roughly?

A. I have about 20 of them here.

Q. Is that the whole number or are there others?

A. Oh, there are others, this is only a portion.

By the COURT:

Q. Do you mean where they have the same language?

A. Where they have precisely the same language.

103 By Mr. BROWN:

Q. Do you know of any interpretation by custom of either or both of those clauses?

A. As regards the first clause——

Mr. KIRLIN: I object again to the custom.

The WITNESS: As regards the first clause where he distinctly states that the vessel has to go to such dock or wharf as may be designated by the charterer or their agent provided she can always lay afloat, it is a positive fact without doubt that it is the custom of the ship to go to that place provided a berth is designated where she can always lay afloat; and the reason why refiners buy full cargoes of sugar—at least one of the reasons—is that they have a right to order them to their own refineries to discharge in order to save any expense there may be of discharging them anywhere else.

Q. Do you know of any interpretation by custom in case a vessel is unable by height of her mast to reach the dock designated?

A. I have never known any case to come up before similar to this. The only thing I have known is what I have heard here where ships were ordered above the bridge and had to cut the masts to go there.

Q. How about clause 4?

A. There has been no ruling in court as far as I understand.

Q. In the trade is there a custom?

A. In the trade there is a custom which is understood in the trade.

Q. Tell what it is?

A. These charters, if I may explain——

By the COURT:

Q. No. As to subdivision 4?

A. Subdivision 4? In all charters they are all in a printed form and they are used not only to cover one branch of business but other branches and it is very often a ship is ordered to a port, for instance, some of the ports in China, where she can only go within a certain distance of the port; then it is understood that if
104 the vessel cannot reach, cannot get into the port on account of any bar outside of the port, that the lighterage clause applies, that the receivers of the cargo will pay the lighterage or pay so much of it as will permit the vessel to cross the bar and get to her destination. There is only one way in which this could apply here in New York, and that is if the vessel had been ordered to the Matthiessen & Weeks' refinery in Jersey City; under this lighterage clause the receivers of the cargo, the American Sugar Refining Company, would require to pay the lighterage for such portion of her cargo as was necessary to allow the vessel to reach the dock as they have done in hundreds of cases, because the water is too shallow for the vessel to go there. If, for instance—this is a hypothetical case—if the water was very shallow at the bar of New York and this vessel couldn't get in to the port, why then you would have to lighter the cargo.

Q. That is the custom that you have been testifying to?

A. That is the custom that I have been testifying to.

Q. In the case of charter-parties with that subdivision 4. The custom you speak of obtains with reference to charter-parties that have subdivision 4 in them just as you find it there?

A. Yes, sir.

By Mr. BROWN:

Q. How much time was consumed in discharging into lighters?

A. I don't remember. I should say about a week; it may have been ten days.

Q. Do you know any case in respect to this particular vessel, the *Benlarig*, in which her cargo has been lightered to her below the bridge from a place above the bridge, or lightered from her docks above the bridge?

Objected to. Objection sustained.

Cross-examined by counsel for libellant.

By Mr. KIRLIN:

Q. What was the relation of Arbuckle Brothers to the charterers, Erdmann & Sielkin?

A. None at all.

105 Q. The Arbuckle Brothers held the ship's documents when she got here?

A. Yes, sir.

Q. Did they have a copy of the charter-party?

A. Yes, sir.

Q. And of the bills of lading?
A. Yes, sir.
Q. From whom did they come to the hands of Arbuckle Brothers?
A. Czarnikow, MacDougall & Co. of New York.
Q. Is that MacDougall the one who has testified here this morning?
A. Yes, sir; from whom we purchased the cargo.
Q. With the purchase of the cargo did you take assignment of the documents?
A. Of all the documents.
Q. As I understand it you paid all the freight ultimately, except this fourteen hundred odd dollars which you deducted on account of the lighterage?
A. Yes, sir.
Q. How many sailing vessels from Java drawing 21 feet have come to your refinery by way of Hell Gate?
A. None.
Q. Have you not seen the lighterage clause very frequently in charter-parties in this form, "lighterage, if any, to be at the risk and expense of cargo"?
A. Not in a Java charter; I have never known of it.
Q. Have you known of it, "lighterage, if any, to be paid by charterers"?
A. No, sir; I never have.
Q. You have never known a case I suppose where there was a permanent mast on the ship which wouldn't go under the bridge until this case came up?
A. Yes I knew of the *Englehorn* and I knew of the *Trade Winds*.
Q. Mainmast I am speaking of.
A. I don't know whether it was the mainmast or jigger-mast.
Q. Those are the only cases you know of?
A. Those are the only cases I know of.

By Mr. BROWN:

Q. How much water is there at your refinery?
A. 25 feet at low water.

106 By the COURT:

Q. Those two ships where the jigger-mast was cut the cargo was not consigned to you?
A. No, sir; they were not consigned to us.

GEORGE ROSSEN, being duly sworn and examined as a witness for the respondent, testifies:

By Mr. BROWN:

Q. You are in the employ of Peter Wright & Sons, agents for the ship *Benlarig*, are you not?
A. I am.
Q. Did you make this charter yourself?
A. I did not.

Q. Who made it?
A. I don't know.
Q. How long has your firm acted as agents for the *Benlarig?*
A. In New York I think ever since she has been a ship. We have been agents for Watson Brothers I think for 30 years; the owners.
Q. How old is the *Benlarig?*
A. I think about five or six years.
Q. Prior to the signing of this charter-party July 1st 1898, hadn't the *Benlarig* previously found herself unable to pass under the bridge?
A. She had.
Q. On what occasion?
A. I think it was in 1893.
Q. Her owners paid the cost of lighterage in that case didn't they?

Objected to as immaterial. Objection sustained.

Q. What was the character of the charter-party on that occasion?

Objected to as immaterial. Objection sustained.

Q. Was there any other instance in the history of the *Benlarig* in which she lightered her cargo from above the bridge or to a place above the bridge?

Objected to as immaterial. Objection overruled.

A. I believe subsequent to the delivery of this cargo in dispute.
107 Q. Subsequent to the delivery of this cargo?
A. Yes, sir.
Q. Not before?
A. There was a case before. You asked about that.
Q. Was there any other?
A. I only know of two and I don't know of this last one because I was in Europe at the time.
Q. There was only one instance then before this particular controversy of the *Benlarig?*
A. That is all that I remember.

By the COURT:

Q. To whom was the cargo consigned in the first case?
A. It was an outward cargo, a cargo of oil.
Q. She took the cargo below the bridge?
A. She loaded below the bridge.

By Mr. BROWN:

Q. Wasn't she required by the charterers to load above the bridge?

Objected to. Objection sustained.

Q. Where did the cargo come from on that occasion?

A. I believe it came from South Tenth street; De Voe's yard, that is above the bridge.

Q. Do you know whether the vessel tried to go above the bridge?

A. She did not.

Q. Do you know whether she was required to go above or asked to go above?

Objected to. Objection sustained.

Q. Did you know, as matter of fact, at that time that the vessel couldn't go beyond the bridge?

A. I did.

Respondents rest.
Testimony closed.

Libellant's Exhibit 1, plan of Brooklyn bridge. Not printed.

108 *Opinion.*

JANUARY 16, 1900.

THOMAS, *J.*:

The *Benlarig* was chartered in London, July 1, 1898, by her owners to Erdmann & Sielcken, of Batavia, to carry a cargo of sugar from Java. The charter-party, among other things, states, that the vessel "being so loaded (and dispatched), shall (unless ordered to a "direct port of discharge, on signing last bills of lading) therewith "proceed to Barbadoes, thence Queenstown or Falmouth (as di- "rected by charterers or their agents), for orders, to discharge "always afloat, either at a safe port in the United Kingdom or on "the continent of Europe between Havre and Hamburg (both in- "cluded) Rouen excluded, or at option of charterers to order vessel "from Barbadoes, to proceed to Delaware breakwater for orders, to "discharge at New York, or Boston, or Philadelphia, or Baltimore, "or so near the port of discharge as she may safely get, and deliver "the same, always afloat, in a customary place and manner, in such "dock as directed by charterers, agreeably to bills of lading, on "being paid freight in full of all port charges, pilotage, and primage "as customary at port of discharge, &c."

Section 4 of the charter-party provides: "All goods to be brought "to and taken from alongside of the ship, always afloat, at the said "charterers' risk and expense, who may direct the same to the most "convenient anchorage, lighterage, if any, to reach the port of des- "tination, or deliver the cargo at port or destination, remains for "account of receivers, any custom of the port to the contrary not- "withstanding."

From Batavia the ship went to Barbadoes for orders pursuant to, which she came to New York. Bills of lading had been issued for the cargo, making it deliverable at the port of discharge as per charter-party, to Messrs. Winter & Smillie as agents, or to their assigns, he or they paying freight for the said sugar as per charter-

party. The ship's documents were delivered to Czarni-
109 kow, MacDougall & Company, of New York, who transferred the same to the claimants. After due notice of the ship's arrival, the claimants gave orders in writing for the discharge, above the Brooklyn bridge, at their refinery at the foot of Pearl street, Brooklyn. As the master considered that two of the ship's masts would not go under the bridge, arrangements were made between the parties for delivering the cargo by lighters, and payment of the expense thereof was deferred for subsequent determination. The question here is whether such expense should fall upon the libellant or claimants.

The *Benlarig* was a square-rigged, iron ship; her three masts were built up solid from the bottom to the top, and were composed of cylindrical plating rivetted together, and internal transverse angle-iron braces. The mainmast was 139 ft. 10 in. above the deck, and the deck was 5 ft. 2½ in. above the deep-water load line at the mainmast, making the total height of that mast 145 ft. and ½ in. The foremast was 136 ft. 8 in. above the deck, but the height of the deck above the water line at that part of the ship is about 7 ft., so that the height of this mast was 143 ft. 8 in. The mizzen-mast was 129 feet above the deck, which was 7 ft. above the water line, so that the height of the mizzen-mast from the water was 135 ft. The clear height of the Brooklyn bridge above the mean high water is 135 ft., and the mean rise and fall of the tide is 4 and $\frac{5}{10}$ ft. At dead low water the ship could not pass under the bridge without cutting off about 5 ft. from the mainmast and foremast, while safety required greater removal from such masts to avoid the effect of any disturbance of the water. After the ship should have been discharged it would be necessary to cut off an additional portion of such masts, and also some part of the mizzen-mast, to allow her to repass under the bridge, unless a return cargo could have been taken above the bridge, or the ship could have gone out by the East river and Long Island sound. There were but two means of escaping this mutilation of the masts, for the purpose of discharging the cargo; first, by approaching New York from the east, through Hell Gate.
110 All shipping experts called by the claimants testified that they had never heard of a ship from Java pursuing that course. It may, therefore, be concluded that such alternative was contrary to the expectations and understanding of all parties to this contract, or of any other contract for the carriage of sugar from Java. The remaining alternative was to lighter the sugar; and the question is, upon which party the expense of such lighterage should fall. It is quite exceptional for a ship to have immovable masts so high that she cannot pass under the bridge, and there is no custom or practice known among shipping merchants respecting such a case. This is the concurring testimony of all the witnesses called by the claimants.

Before considering the charter-party it should be stated that the ship had been before at the port of New York, and the owners well knew that she could not pass under the bridge without disturbing her masts. It is not understood that the charterers had this knowl-

edge. On the other hand there is no notice to the ship that it would be necessary to discharge the cargo above the bridge, although in fact about seventy-five per cent. of the sugar now received at this port is so discharged. If this knowledge of the owners be urged against them, it may be answered that for this very reason they may have considered themselves protected by the terms of the charter-party, and in fact all previous notice, or understanding by either party, must be regarded as merged in the charter-party, and to the interpreting of that instrument resort must be had to ascertain the relative rights.

The charter is stated by a witness connected with claimant's factory to be the same charter usually employed in the Java sugar trade, although the words "always afloat" seem to have been interlined in the fourth subdivision. The essential question is whether the provisions of the charter already quoted relieve the ship from delivering cargo above the bridge. For whatever purposes such stipulations were originally embodied in charter-parties, they have been retained and adopted for use in view of existing structures, and it is considered that the provisions are sufficiently broad to
111 relieve the ship. This conclusion is reached through no ingenuity of construction, but by giving to the language the meaning which might be ordinarily gathered from the words used. The initial agreement in the charter is to deliver the cargo at one of several ports "so near the port of discharge as she may safely get, "and deliver the same, always afloat, in a customary place and "manner, in such dock as directed by the charterers." This provision seems to be a direct stipulation to deliver the goods at any place where the ship might float, in such dock as directed by the charterers, in a customary place and manner, when such dock shall have been reached. The evident intention is that the ship shall go to the designated port, if she can get there in safety, and the continuing thought seems to be, that she shall deliver the goods in a dock designated by the charterers, in a customary place and in a customary manner. Any intelligent construction would seem to demand that the ship would not be ordered to a dock where it would be unsafe for her to go, whether the danger arose from the depth of water, or any other cause. For instance, the ship could not be ordered to a slip which was too narrow to receive her, or where there was some overhanging shed or house that would prevent. So, if the entrance to the dock were obstructed, or there was other interference with the discharge at the place designated. But section four is explicit, and states that the goods are to be taken from alongside the ship at the charterers' risk and expense, although they are permitted to direct her to the most convenient anchorage, and that any lighterage, either to reach the port of destination, or to deliver the cargo at such port, shall be paid by the receivers, notwithstanding any contrary custom of the port. Now, lighterage was necessary for the purpose of delivering this cargo after the ship reached the port of destination, for the reason that the ship could not make the delivery without such lighterage, unless she was mutilated by the cutting off of her masts. The proposition then is: if the charterers stipulate to

pay the lighterage necessary for the purpose of delivering the cargo may they be excused from observing this agreement upon the plea that no lighterage would be necessary if the masts of the ship
112 were cut down to a certain length. It is thought that it is the privilege of the ship to be preserved from self-mutilation, and that she need not be crippled, deformed, or dismantled, for the purpose of delivering her cargo. Apparently that should never be required. It should not be expected. Rather than that it is expectable that the cargo should be lightered by the ship-owners, and that they would pay for the same. But the expectation as to the person upon whom the payment of the lighterage should fall changes when it appears that there is a stipulation that the receivers shall themselves pay the lighterage. It is useless to conjecture respecting these stipulations: where they are, as in the present case, unambiguous. It is better to take words at their apparent ordinary meaning, and hold parties to their agreement according to the plain sense of the language used. Adopting such rule the libellant should recover.

Since the trial of this case the attention of the court has been called to *re* an arbitration between Goodbody & Co. and Balfour, Williams & Co., 8 Asp. Mar. Law Cas., 303 (part 7, November, 1899). In that case a cargo had been sold to arrive by the steamer *Vanduara* on condition that the bills of lading should provide for its delivery "at any safe port in United Kingdom of Great Britain * * * vessel to discharge afloat." The bills of lading provided that the cargo should be delivered "at any safe port in the United Kingdom, Manchester excepted," and the vendee refused to accept the documents upon the ground that they did not comply with the contract for delivery at any safe port in the United Kingdom. It was found that the *Vanduara* when loaded with the said cargo would have been unable to go up the Manchester ship canal to the Manchester docks, without dismantling the ship, because the heads of her main and mizzen masts would be higher than the limit fixed by the canal company's regulations for passing under the Runcorn bridge. Runcorn bridge is about twenty-four miles from Manchester, and about twelve miles from the entrance of the canal. In the opinion this language was used: "It was contended on behalf of the sellers "that Manchester was not a safe port for the *Vanduara*, because the "height of her masts prevented her getting to Manchester, and
113 "that, therefore, the words in the charter-party and the bill "of lading, 'Manchester excepted,' did not amount to a "variance from the terms of the contract, because as Manchester "was not a safe port for the ship she could not in any case have been "ordered there." In the opinions it is stated: "She could not have "been ordered to Manchester in any case, because she could not "have got under Runcorn bridge, and the presentation of docu-"ments containing the words 'Manchester excepted' imposed no "restriction upon the purchaser inconsistent with the terms of the "contract of purchase. * * * I may observe that the contract "was for a cargo per *Vanduara*, a named ship, and, if in point of "fact Manchester was not a safe port for her, it does not seem to me

"that the defendants were in any way prejudiced by a phrase being "introduced into the document which abridged none of their rights, "and imposed no restriction which was not imposed by the terms of "the contract itself." Again, "It is clear that Manchester, in the "limited sense, cannot be a safe port for a vessel which in order to "reach it must be wholly dismantled."

In the above case it appears that the port was sufficiently safe but that the canal was crossed by a bridge which prevented the ship from reaching the port in safety unless she were dismantled. In the present case the facts are equal, and in addition the parties have stipulated that the receivers should bear the expense of the lighterage, an element which was lacking in the instance to which attention has just been called. The skillful argument of the claimants gives a totally different meaning to the charter-party. If what appears to the court to be a plain statement of duties in this instance favorable to the libellant has quite other significance, yet it would be considered that the claimant should not succeed. The ship stipulated to deliver the cargo at any one of many ports, and while it was undoubtedly her duty, after arriving at a designated port, to go to such point therein as she could safely, it is thought that she would not be obliged to go to such point in the harbor at the peril of injury or at the sacrifice caused by mutilation of her
114 masts. It seems that in selecting a convenient dock for discharging in a harbor, the receivers of the cargo must select one which the ship can physically approach, and if there be a permanent structure in the way, the conception that the ship should not encounter this would seem to enter into the spirit and understanding of their agreement.

The libellant should have a decree for the balance of the unpaid freight, with costs.

At a stated term of the United States district court for the eastern district of New York held in the court-rooms in the Federal building in the city of New York, borough of Brooklyn, on the 20th day of January, 1900.

Present: Hon. Edward B. Thomas, district judge.

ANTON MENCKE, Libellant,
against
A CARGO OF JAVA SUGAR EX SHIP "BENLARIG," JOHN ARBUCKLE, William V. R. Smith, James N. Jarvie, and Wil- A. Jamison, Doing Business under the Firm Name of Arbuckle Brothers, Claimants.

This case having come on to be heard on the pleadings
115 and proofs adduced by the respective parties, and having been argued by the advocates for the respective parties, and due deliberation having been had in the premises,

Now, on motion of Convers & Kirlin, proctors for the libellant, it is hereby

Ordered, adjudged and decreed, that the libellant Anton Mencke recover of and from the claimants John Arbuckle, William V. R.

Smith, James N. Jarvie and William A. Jamison, doing business under the firm name of Arbuckle Brothers, the sum of $1,466.12, together with interest thereon from May 27th, 1899, amounting to $56.93, together with the further sum of $96.45 costs as taxed, making in all the sum of $1,619.50. And on the like motion it is further

Ordered, adjudged and decreed, that unless an appeal be taken from this decree within the time prescribed by the rules and practice of this court, that the libellant have execution to enforce the same, and that the sureties on the claimants' stipulations, for value and costs cause the engagements of their stipulations to be performed, or show cause within four days thereafter why execution should not issue against their goods, chattels and lands to enforce this decree.

EDWARD B. THOMAS, *U. S. J.*

Please take notice, that the within decree will be presented to the Honorable Edward B. Thomas for settlement, at his chambers, on the 20th day of January, 1900, at 10.30 a. m., or as soon thereafter as counsel can be heard.

Dated New York, January 18th, 1900.

Yours, &c., CONVERS & KIRLIN,
Proctors for Libellant.

To Messrs. Butler, Notman, Joline & Mynderse, proctors for claimants.

(Endorsed:) Final decree and notice of settlement.—Filed and entered the 20th day of January, 1900.

116 District Court of the United States for the Eastern District of New York.

ANTON MENCKE, Master of the Ship "Benlarig," Libellant,
against
A CARGO OF JAVA SUGAR EX SHIP "BENLARIG," JOHN ARBUCKLE *et al.*, Claimants.

Please take notice, that the claimants herein appeal to the United States circuit court of appeals for the second circuit from the final decree entered herein in the district court of the United States for the eastern district of New York, on the 20th day of January, 1900.

Yours, &c., BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for Claimants, Appellants.

Office & P. O. address, 54 Wall street, New York city.

To Messrs. Convers & Kirlin, proctors for libellant, appellee; Richard P. Morle, Esq., clerk.

Bond for cost on appeal is hereby waived.

CONVERS & KIRLIN,
Proctors for Libellant.

February 5, 1900.

(Endorsed:) Notice of appeal.—Filed February 6, 1900.

117 United States District Court, Eastern District of New York.

ANTON MENCKE, Libellant,
against
A CARGO OF SUGAR EX SHIP "BENLARIG," ARBUCKLE BROTHERS, Claimants.

Assignment of Errors.

The claimants hereby assign error in the rulings, decision and decree of the district court herein, as follows:

First. For that the district court erred in holding that the libellant's obligation to deliver cargo "in a customary place and manner" applied only after the designated dock had been reached.

Second. For that the court erred in holding that the lighterage clause in the charter-party was applicable to the facts in this case with the effect of imposing the lighterage charges upon the claimants.

Third. For that the court erred in holding that the claimants were not entitled to designate the dock at their refinery as the place of discharge of the *Benlarig*, and to require delivery of cargo there.

Fourth. For that the court erred in holding that because the ship *Benlarig* was prevented by the peculiarities of her construction
118 from reaching the designated dock unless by way of Hell Gate, or by reducing her mast so that she might pass under the Brooklyn bridge, she was thereby relieved from the obligation of making delivery of her cargo at the designated dock by means of lighterage or otherwise.

Fifth. For that the court erred in holding that the peculiarities of the construction of the *Benlarig* relieved her from proceeding to the dock designated by the charterers.

Sixth. For that the court erred in awarding to the libellant by its decree the sum of one thousand four hundred and sixty-six and 12/100 ($1,466.12) dollars, with interest and costs, or any sum whatever.

Seventh. For that the court erred in refusing to enter a decree dismissing the libel, with costs to these claimants.

Dated New York, February 10, 1900.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for the Claimants.

(Endorsed:) Assignments of error.—Filed February 15, 1900.

UNITED STATES OF AMERICA, } ss:
Eastern District of New York, }

I, Richard P. Morle, clerk of the district court of the United States, for the eastern district of New York, do hereby certify that the foregoing is a correct transcript of the record on appeal made up to be transmitted to the United States circuit court of appeals, in the case of Anton Mencke, libellant-appellee, against A Cargo of Sugar *ex* Ship *Benlarig*, James N. Jarvie, *et al.*, claimants-appellants.

In witness whereof, I have hereunto set my hand and the seal of said court, this 30th day of July, 1900.

[SEAL.] RICHARD P. MORLE, *Clerk.*

119 United States Circuit Court of Appeals for the Second Circuit, October Term, 1900.

ANTON MENCKE, Libelant, Appellant,
v.
A CARGO OF JAVA SUGAR EX SHIP "BENLARIG," James N. Jarvie, Claimant, Appellant.

No. 96. Submitted March 1, 1901. Decided April 3, 1901.

Appeal from the district court of the United States for the eastern district of New York.

Before Judges Wallace, Lacombe, and Shipman.

This is an appeal from the decree of the district court for the eastern district of New York in favor of the libelant.

The facts of the case are stated by the district judge (99 Fed. Rep., 298), as follows:

"The *Benlarig* was chartered in London, July 1, 1898, by her owners to Erdmann & Sielcken, of Batavia, to carry a cargo of sugar from Java. The charter-party, among other things, states that the vessel, 'being so loaded (and dispatched), shall (unless ordered to a 'direct port of discharge on signing last bills of lading), therewith 'proceed to Barbadoes, thence Queenstown or Falmouth (as directed 'by charterers or their agents), for orders to discharge always afloat

'either at a safe port in the United Kingdom or on the con-
120 'tinent of Europe between Havre and Hamburg (both in-
'cluded), Rouen excluded, or at option of charterers to order 'vessel from Barbadoes, to proceed to Delaware breakwater for orders, 'to discharge at New York, or Boston, or Philadelphia, or Baltimore, 'or so near the port of discharge as she may safely get, and deliver 'the same, always afloat, in a customary place and manner, in such 'dock as directed by charterers, agreeably to bills of lading, on be-'ing paid freight in full of all port charges, pilotage and primage as 'customary at port of discharge, &c.'

"Section 4 of the charter-party provides: 'All goods to be 'brought to and taken from alongside of the ship, always afloat, at 'the said charterer's risk and expense, who may direct the same to

'the most convenient anchorage; lighterage, if any, to reach the 'port of destination, or deliver the cargo at port or destination, re- 'mains for account of receivers, any custom of the port to the con- 'trary notwithstanding.'

"From Batavia the ship went to Barbadoes for orders pursuant to which she came to New York. Bills of lading had been issued for the cargo, making it deliverable at the port of discharge as per charter-party, to Messrs. Winter & Smillie as agents, or to their assigns, he or they paying freight for the said sugar as per charter-party. The ship's documents were delivered to Czarnikow, MacDougall & Company of New York, who transferred the same to the claimants. After due notice of the ship's arrival, the claimants gave orders in writing for the discharge, above the Brooklyn bridge, at their refinery at the foot of Pearl street, Brooklyn. As the master considered that two of the ship's masts would not go under the bridge, arrangements were made between the parties for delivering the cargo by lighters, and payment of the expense thereof was deferred for subsequent determination. The question here is whether such expense should fall upon the libelant or claimants.

"The *Benlarig* was a square-rigged, iron ship, her three masts were built up solid from the bottom to the top, and were
121 composed of cylindrical plating rivetted together, and internal transverse angle-iron braces.

* * * * * * *

"The clear height of the Brooklyn bridge above the mean high water is 135 feet, and the mean rise and fall of the tide is 4 and 5/10 feet. At dead low water the ship could not pass under the bridge without cutting off about 5 feet from the mainmast and foremast, while safety required greater removal from such masts to avoid the effect of any disturbance of the water. After the ship should have been discharged it would be necessary to cut off an additional portion of such masts, and also some part of the mizzen-mast, to allow her to repass under the bridge, unless a return cargo could have been taken above the bridge, or the ship could have gone out by the East river and Long Island sound. There were but two means of escaping this mutilation of the masts, for the purpose of discharging the cargo; first, by approaching New York from the east, through Hell Gate. All shipping experts called by the claimants testified that they had never heard of a ship from Java pursuing that course. It may therefore be concluded that such alternative was contrary to expectations and understanding of all parties to this contract, or of any other contract for the carriage of sugar from Java. The remaining alternative was to lighter the sugar; and the question is upon which party the expense of such lighterage should fall."

There is no custom in the port of New York respecting the course to be pursued by vessels directed to discharge above the bridge, which have immovable masts too high to permit a passage beneath the bridge. Three of such cases were known by the witnesses to have existed, and in these the masts were cut. One of the vessels

had a steel mast. Vessels with immovable steel masts of that height have not been built until within the last ten years and are very few in number, perhaps not over a dozen. From seventy-five to eighty-five per cent. of the sugar arriving at New York in vessels is
122 discharged at the docks of refineries above the bridge. Charters sometimes provide that the vessels shall not go above the bridge and sometimes that charterers have the right to order the ship above the bridge, they paying the expense thereof. The expense of housing the masts, or of cutting a wooden mast is not very large. The form of articles 1 and 4 of the charter in question is a very familiar one to sugar refiners.

SHIPMAN, *C. J.:*

On the construction of the two provisions of the charter-party which apparently are applicable to this case, the question, not easy of solution, arises.

By article 1, the vessel was to discharge as near the port of discharge as she could safely get, and deliver the cargo, always afloat, in a customary place and manner, at the dock directed by charterers.

New York was one of the designated ports, and no question arises as to her safety. In this respect the facts of the case differ from those in "*Re* an arbitration between Goodbody & Co., and Balfour, Williams & Co.," 8 Asp. Mar. Law, 303, in which Manchester was held not to be a safe port for the vessel in question, because, by reason of the height of her masts, she could not get under Runcorn bridge, about twenty-four miles from Manchester and about twelve miles from the entrance of the canal, and the ship would have to be dismantled twenty-four miles from the port. The Benlarig was in the port of discharge, and the Arbuckle dock was a safe one where she could be always afloat, and a customary place for the discharge of sugar. The exceptional height of her masts and the unusual character of their construction alone interfered with the vessel's performance of her part of the contract, and, unquestionably, but for article 4, she would have been obliged either to deliver or to pay for the damages occasioned by non-delivery at the Arbuckle dock. Article 4 provides that lighterage if any, to deliver the cargo at the port of destination is to be paid by the receivers, any custom of the
123 port notwithstanding. The argument of the libelant by which the two claims are sought to be made harmonious, and in which the district judge concurred, is that the cargo is to be delivered at the usual and customary place designated by the charterers or by the single consignee of the entire cargo; but if such delivery is prevented by a permanent cause, such as lack of depth of water or permanent obstructions at the port, and the cargo must be lightered, the expenses of such lightering are to be borne by the charterers. In the application of the construction, the libelant urges that as the Brooklyn bridge prevented a delivery beyond it, and, as a mutilation or destruction of the ship's masts would be a serious injury and recourse must be had to lighters, the state of facts provided for by article 4 existed.

Article 4 is a well-known provision and was introduced into charter-parties originally to provide for the payment of lighterage when the vessel was unable to deliver the cargo at the dock to which she had been assigned from a cause to which vessels generally might be expected to be subject, such as shoal water or a bar, and if the Brooklyn bridge was an obstruction to vessels generally or to such a proportion of vessels as to have become a well-recognized impediment to navigation, the construction of the libelants would be correct. This form of charter is the one commonly used in the sugar trade for the purpose of meeting a customary condition of affairs in different ports, and in regard to which a custom of the port would naturally exist. The facts in this case were exceptional and eccentric. When vessels having too high masts which can be lowered are ordered to go above the bridge, the masts are housed and the vessels proceed. In the rare instances which appear in the record of immovable masts of excessive height, they were cut. In this case, the vessel had steel masts of excessive height and a recent, exceptional and immovable method of construction, which
124 makes the repair of the masts a serious affair. The owners knew or had reason to know of this peculiarity, but did not insert a provision in the charter that she should not be required to go above the bridge, but preferred to rely upon article 4. The case is that of the claimed application to novel circumstances of a clause intended for a different set of circumstances, and is as if a vessel, unable by reason of its novel construction to reach a dock which ninety-nine per cent. of vessels do reach, should desire to place the expenses of lighterage upon the charterers under article 4. Such an attempt would be and the facts of this case are within the letter of the article, but not within its spirit.

The decree of the district court is reversed, with costs of this court, and the case is remanded with directions to dismiss the libel, with costs.

Wilhelmus Mynderse, for the appellants.

J. Parker Kirlin, for the appellee.

125 At a stated term of the United States circuit court of appeals, in and for the second circuit, held at the court-rooms, in the post-office building, in the city of New York, on the 16th day of April, one thousand nine hundred and one.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. Nathaniel Shipman, circuit judges.

ANTON MENCKE, Libelant, Appellee,
against
A CARGO OF JAVA SUGAR EX SHIP BENLARIG, JAMES N. JARVIE *et al.*, Claimants, Appellants.

Appeal from the district court of the United States for the eastern district of New York.

This cause came on to be heard on the transcript of record from the district court of the United States for the eastern district of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said district court be and it hereby is reversed, with costs of this court and cause remanded with instructions to dismiss the libel, with costs.

126 It is further ordered that a mandate issue to the said district court in accordance with this decree.

W. J. W.
E. H. L.
N. S.

(Endorsed:) United States circuit ct. of appeals, second circuit.—Anton Mencke *vs.* Cargo of Sugar.—Order for mandate.—United States circuit court of appeals, second circuit.—Filed Apr. 16, 1901.—William Parkin, clerk.

127 UNITED STATES OF AMERICA, } ss.:
Southern District of New York, }

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from — to — inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Anton Mencke, libellant, appellee, against Cargo of Java Sugar, *ex* Ship "Benlarig," James N. Jarvie, *et al.* claimants, appellants as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 27th day of April, in the year of our Lord one thousand nine hundred and one and of the Independence of the said United States the one hundred and twenty-fifth.

Seal United States Circuit Court of Appeals, Second Circuit.

WM. PARKIN, *Clerk.*

128 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which A Cargo of Java Sugar, *ex* Ship "Benlarig," James N. Jarvie *et al.*, claimants, are appellants, and Anton Mencke is appellee, which suit was removed into the said circuit court of appeals by virtue of an appeal from the district court of the United States for the eastern district of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed

129 into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 15th day of May, in the year of our Lord one thousand nine hundred and one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

130 [Endorsed:] File No. 18,140. Supreme Court of the United States. No. 655, October term, 1900. Anton Mencke, *vs.* A Cargo of Java Sugar, *ex* Ship Benlarig, James N. Jarvie *et al.*, claimants. Writ of certiorari. United States circuit court of appeals, second circuit. Filed May 16 1901 William Parkin, clerk.

131 To the honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having been lately certified and filed in the office of the honorable, the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and under direction of counsel for the appellants, said stipulation is hereby certified as a return to the writ of certiorari issued herein.

Dated New York, May 16th, 1901.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

{ Ten-cent United States internal-revenue stamp, canceled 5, 17, '01. Wm. P., cl'k. }

132 United States Circuit Court of Appeals for the Second Circuit

ANTON MENCKE, Libelant, Appellee,
against
A CARGO OF JAVA SUGAR EX SHIP BENLARIG, JAMES N. Jarvie *et al.*, Claimants, Appellants.

It is hereby stipulated and agreed that the transcript of record heretofore certified to the Supreme Court by the clerk of this court, and filed in the office of the clerk of the Supreme Court of the United States with the application for a writ of certiorari herein, may be taken as the return to the writ issued by said Supreme Court to said circuit court of appeals under date of May 15th, 1901, and that this stipulation may be certified to the Supreme Court by the clerk of this court, as and for the return to the said writ.

Dated New York, May 16th, 1901.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for James N. Jarvie et al.
CONVERS & KIRLIN,
Proctors for Anton Mencke.

133 [Endorsed:] United States circuit court of appeals, second circuit. Anton Mencke *v.* A Cargo of Java Sugar *ex* Ship "Benlarig." Return to writ of certiorari.

134 [Endorsed:] File No. 18,140. Supreme Court U. S. October term, 1900. Term No. 655. Anton Mencke, petitioner, *vs.* A Cargo of Java Sugar, &c. Writ of certiorari and return. Filed May 20, 1901.

894 90
No. 655.
Supreme Court U.S.
FILED
APR 29 1901
JAMES H. MCKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900

Ahsan Mirzaka,

Petitioner,

against

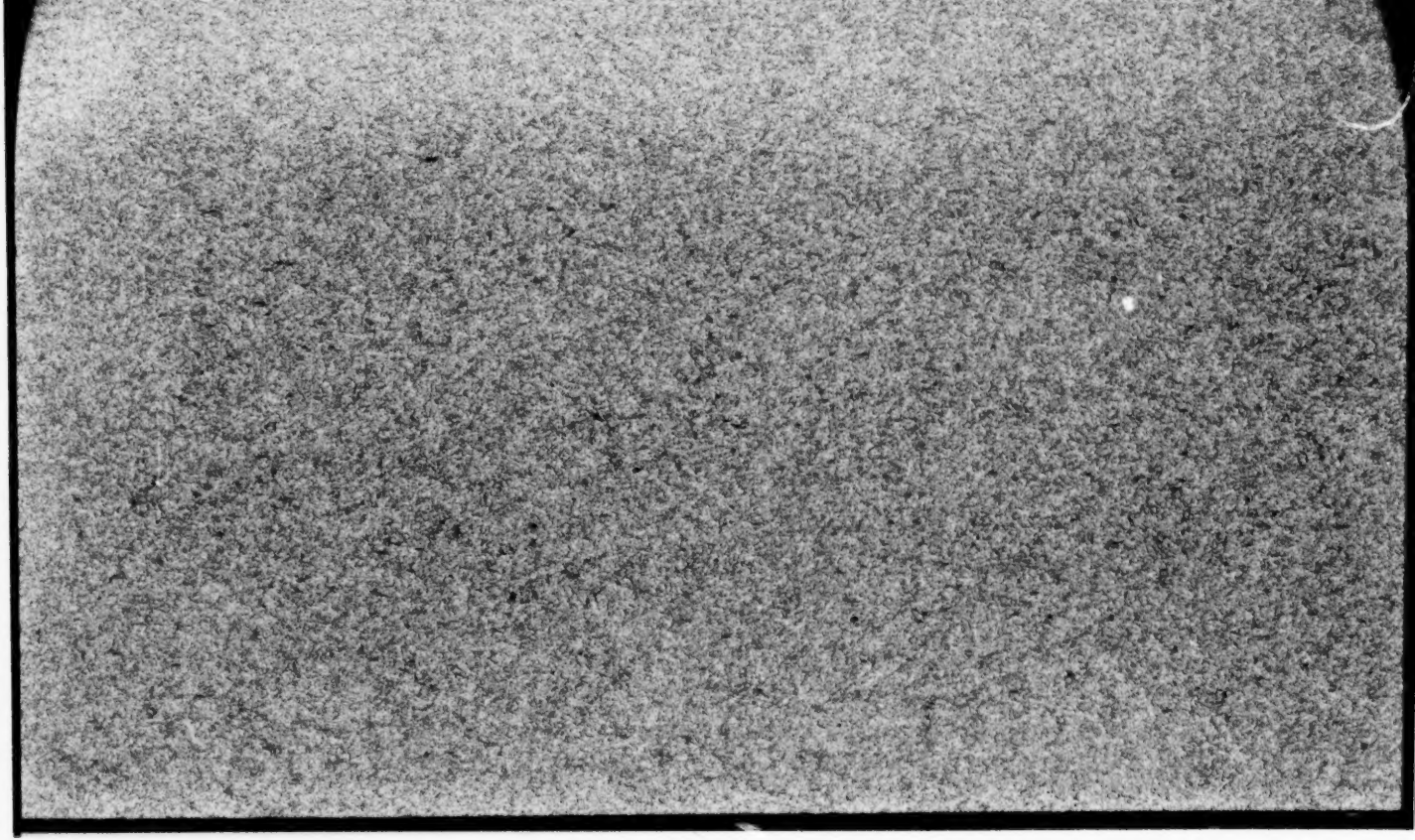
2 Cargo of Java Sugar, ex Ship "Sentinel"
James H. Doyle et al.

Claimants.

PETITION FOR WRIT OF CERTIORARI

Charles A. Kinsler,
Proctor for Petitioner.

A. Fenton Mirzaka,
Counsel & Proctor,
Of Counsel.



Supreme Court of the United States,

OCTOBER TERM, 1900.

ANTON MENCKE,
Libelant-Appellee, Petitioner,

AGAINST

A Cargo of Java Sugar, ex Ship BENLARIG, JAMES N. JARVIE *et al.*,
Claimants-Appellants.

SIRS:

Please take notice that the annexed petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit will be presented to the Supreme Court of the United States on Monday, April 29, 1901.

Dated New York, April 25, 1901.

Yours, &c.,
CONVERS & KIRLIN,
Proctors for Anton Mencke, Petitioner.

To Messrs. BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for Claimants.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

ANTON MENCKE,
Libelant Appellee, Petitioner,

AGAINST

A Cargo of Java Sugar ex Ship BENLARIG, JAMES N. JARVIE *et al.*,
Claimants-Appellants.

Petition for certiorari to the Circuit Court of Appeals for the Second Circuit.

TO THE HONORABLE THE CHIEF JUSTICES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The petition of Anton Mencke respectfully shows unto this Court as follows:

I.—The case now sought to be brought into this Court presents for decision the questions:

a. Whether under a charter-party which provides that the charterer may order the vessel with her cargo to proceed to "a *safe* port * * * or so near the port of discharge as she may *safely* get and deliver the same always afloat, in a customary place and manner in such dock as directed by charterers, agreeably to Bills of Lading," the ship may be ordered by the charterer to proceed to a dock above the Brooklyn Bridge in the harbor of New York, although the vessel's masts are so tall that they would

have to be destroyed to enable her to pass under the bridge; and

b. Whether a further clause in the charter party, which provides that "lighterage, if any, to reach the port of destination *or deliver the cargo* at port of destination *remains for account of receivers, any custom of the port to the contrary notwithstanding,*" may be so construed with reference to a custom of the port, or in any other way, so as to place the cost of lightering on the vessel if she is unable to reach the dock to which she is ordered, for the reasons stated above.

II. The libel was filed in the United States District Court for the Eastern District of New York on May 27, 1899, by the master of the British ship Benlarig to recover an unpaid balance of freight amounting to $1,929.52. This sum was deducted from the freight by the receivers of the cargo, to cover the cost of lightering the cargo from the dock below the Brooklyn Bridge where it was discharged, to the claimants' refinery which was above the Bridge. The ship had been ordered by the receivers to proceed directly to the claimants' refinery, but had been unable to do so because the height of her masts was such that she could not pass under the Bridge.

On January 29, 1900, a final decree was entered in favor of the libelant adjudging that the cost of lighterage should be borne by the cargo (p. 114).

An appeal from this decree was taken by the claimants to the United States Circuit Court of Appeals for the Second Circuit, and on April 3, 1901, an opinion was handed down by that Court reversing the decree of the District Court and remanding the case with directions to dismiss the libel, with costs (pp. 119-124) on the ground that the claim that the lighterage should be borne by the cargo was within the letter of the lighterage clause, but was not within its spirit.

III.—The facts of the controversy are these:

The ship Benlarig was chartered under a charter-party dated London, July 1, 1898, between Watson Brothers, her owners, and Erdmann & Sielcken, merchants of Batavia, Samarang and Sourabaya, by which it was agreed that the Benlarig should load at Java "a full and complete cargo of dry sugar in baskets and (or in bags" "and being so loaded * * * shall (unless ordered to a direct port of discharge on signing last bills of lading) thereafter proceed to Barbadoes, thence Queenstown or Falmouth as directed by charterers or their agents for orders, to discharge always afloat, either at a *safe* port in the United Kingdom or on the Continent of Europe between Havre and Hamburg, both included, Rouen excluded, or at option of charterers to order vessel from Barbadoes to proceed to Delaware Breakwater for orders to discharge at New York or Boston or Philadelphia or Baltimore, *or so near the port of discharge as she may safely get*, and *deliver the same, always afloat*, in a customary place and manner, in such dock, as directed by charterers agreeably to bills of lading." (*Charter party, Libel and's Ex.* 2, fols. 23, 24).

It was further provided in the charter party, Section 4 (fol. 27):

"All goods to be brought to and taken from alongside of the ship, always afloat, *at the said charterer's risk and expense*, who may direct the same to the most convenient anchorage; *lighterage*, if any, *to reach the port of destination, or deliver the cargo at port of destination, remains for account of receivers, any custom of the port to the contrary notwithstanding.*"

The Benlarig duly loaded a full cargo of sugar in Java as provided by the charter-party (fol. 72) and then proceeded to Barbadoes (*Mencke*, fol. 98). She was there ordered to proceed to New York, which she did directly (*Mencke*, fols. 99, 98).

Bills of lading or receipts had been issued at the

ports of loading, reciting the shipment of the quantities of sugar noted in the margin. All the bills of lading contained the identical conditions that the sugar was "to be delivered in the like order and condition at the port of discharge as per charter-party dated London, 1st July, 1898 (the dangers of the seas excepted) unto Messrs. Winter & Smillie as agents or to their assigns, he or they paying *freight for the said sugar as per charter-party.* General average, if any, to be settled according to York-Antwerp rules 1890, *all other conditions and exceptions*, negligence and Harter Act clauses included, *as per charter-party above referred to* with average accustomed" (*Libelant's Ex.* 3, 4, 5 and 6; fols. 47, 51, 55 59).

Before or at about the time of the arrival of the Benlarig at the port of New York the cargo and the ship's documents including the above mentioned charter-party and bills of lading were sold and transferred to the firm of Arbuckle Brothers (*Gilmour*, fol. 418). This firm claimed to be the owners of the cargo and were in possession of the documents covering it on the ship's arrival (fols. 126, 74, *Gilmour* fol. 417). The delivery of the sugar was made to Arbuckle Brothers (*Gilmour*, fols. 395, 396).

The vessel arrived at New York on April 14, 1899, and on April 15, notice of her arrival and entry at the Customs House together with a request for orders for a discharging berth were sent to the claimants by the vessel's agents (*Libelant's Ex.* 9, fol. 128). At the same time the claimants were notified that the vessel's masts being in one piece would not admit of her passing under the Brooklyn Bridge (fol. 129).

Notwithstanding this notice the claimants after conferring with their London house (fol. 132) gave the vessel orders to discharge at their refinery at the foot of Pearl street, Brooklyn (*Libelant's Ex.* 7, fol. 121). The place of discharge thus selected by the receivers, who stood in the position of the charterers, was above the Brooklyn Bridge.

The clear height of the central span of the Brooklyn Bridge above mean high water is 135 feet (*Martin*, fol. 242).

The average rise and fall of the tide from 1893 to and including 1898 was 4.5 feet (*Spaulding*, fol. 208). The daily tide record from April 15 to May 2 is before the Court (*Spaulding*, fols. 206-208, 233-235). This record shows that the actual rise and fall did not vary materially from the average or mean rise and fall.

At dead low water, therefore, there was not more than 140 feet in the clear at the highest point of the Bridge.

The Benlarig is a three-masted, square rigged ship (*Meneke*, fol. 184). She had three steel masts, built up solid from the bottom to the top (*Meneke*, fol. 158). They were built of cylindrical steel plates, riveted together with internal angle iron braces (*Meneke*, fols. 159, 160).

The mainmast was 139 feet 10 inches above the deck (*Meneke*, fols. 153, 155). The deck at that point was 5 feet 2½ inches above the deep water load line (*Meneke*, fol. 155). The total height of the mainmast above the load line was therefore 145 feet ½ inch.

The foremast was 136 feet 8 inches above the deck (*Meneke*, fols. 153, 155), but the height of the deck above the water line at that point is 7 or 8 feet (*Meneke*, fol. 156), so that the height of the foremast was 143 feet 8 inches or 144 feet 8 inches above the load line or within several inches of the height of the mainmast.

The mizzenmast was 129 feet above the deck (*Meneke*, fol. 155), and the deck was 7 feet above the load line (*Meneke*, fol. 156), so that the mizzenmast was 136 feet above the water line.

On this occasion the vessel was loaded down to her Plimsol line (*Meneke*, fols. 183, 181, 170).

The vessel, therefore, required 145 feet of clear space in order to pass underneath the Bridge.

At dead low water the ship could not pass under

the Bridge without cutting off at least 5 feet from the steel mainmast and foremast (*Meucke*, fol. 178; *ante*, p. 6). On account of the movement of the water a margin would doubtless have had to be allowed for. This would have meant the loss to the ship of 8 or 10 feet of her masts, together with their rigging.

Accordingly, on receipt of these orders on April 15th (*Libelant's Ex.* 7, fol. 121), the vessel's agents again notified the claimants that it was impossible for the ship to pass under the Bridge, and asked for further orders for a discharging berth (*Lebelant's Ex.* 11, fol. 134). No immediate reply was received to this request, and on April 18th the ship's agent again wrote to the claimants asking for another discharging berth, and adding that in default thereof the cargo would be discharged and lightered to the dock already designated by the claimants. The agents further stated:

"If this be your determination, please name the point and send the lighter. We shall look to you and the cargo to pay lighterage in accordance with clause 4 of the charter-party" (*Libelant's Ex.* 13, fols. 141, 143).

The claimants then gave orders for the Benlarig to go to West Central Pier, Atlantic Dock, below the Bridge, to which place they would send lighters to take the sugar from the vessel to the refinery. They also gave notice at the same time:

"We do this in order to save any further delay in discharging vessel, but we beg to distinctly advise you that this action of ours does in no way prejudice our position as regards liability for the lighterage expenses of the cargo, which we claim, under the charter party, is payable by the ship and her owners. The question as to the parties liable for expenses of lighterage can be settled later, but we distinctly disclaim all liability" (*Libelant's Ex.* 12, fols. 138, 139).

It was finally agreed that the discharge of the cargo into lighters at the West Central Pier should

be without prejudice to the rights of either party under the charter and without waiver of the ship's lien on the cargo for the balance of freight or of the claimants' contention that the ship was bound to go above the Bridge, or to pay the cost of lighterage if she unloaded below it (*Answer to 2nd Int.*, fol. 78).

The claimants paid for the lighterage, which amounted to $1,466.12 (*Gilmour*, fol. 397), and deducted this sum from the amount of freight paid by them (*Gilmour*, fol. 418).

In this suit to recover the balance so withheld, the sole controversy is as to which party should pay these lighterage charges, assuming that the ship could not pass under the Bridge without cutting two of her masts, and that she declined to accept orders to discharge her cargo above the Bridge for that reason (*Libelant's Ex.* 13, fol. 142).

IV.—The libelant maintains:

(1.) The right of the receivers, under the clause of the charter-party heretofore quoted (*ante*, p. 1), to select the dock for the discharge was subject to the limitation that such dock must be one that was safe and suitable for the ship as well as for the cargo and one by which the ship could proceed without hindrance by permanent obstacles, which she could not pass without being mutilated, crippled or dismantled.

(2.) Under clause 4 of the charter-party (*ante*, p. 4), any lighterage necessary to deliver the cargo at the port of destination must be paid by the charterers.

The claimants, in effect, contend:

(1.) Their right under the charter-party was so absolute that they could designate a dock above the Bridge although the Bridge was too low for the vessel to pass thereunder.

(2.) The ship was bound to deliver her cargo at the designated dock even though her masts should have to be cut to enable her to reach the dock, or in the alternative that the vessel should have the cargo lightered to the dock at her own expense.

(3.) That by the custom of the port the lighterage clause in the charter party does not mean what it says.

V.—The District Court held that it was exceptional for a ship to have immovable masts so high that she could not pass under the Bridge and that there was no custom or practice among the shipping merchants to meet such a case (fols. 437, 438); that the rights of the parties could be ascertained only from the charter-party (fol. 439); that although the charter-party may be such an one as was usually employed in the Java sugar trade as the claimants contended, and for whatever purposes the stipulations in it had been embodied originally, they had been retained in view of existing structures and were sufficiently broad to relieve the ship (fol. 440). The Court further held that the lighterage was necessary to deliver the cargo after the ship reached the port of destination and that the receivers had expressly stipulated that in such event they should pay the lighterage (fols. 444, 445).

A decree for the libelant was accordingly entered for the cost of the lighterage (p. 114).

VI.—The reasons for the conclusions reached by the District Judge are stated in the following extracts from his opinion:

"Before considering the charter party it should be stated that the ship has been before at the port of New York, and the owners well knew that she could not pass under the Bridge without disturbing her masts. It is not understood that the charterers had this knowledge. On the other hand there is no notice to the ship that it would be necessary

to discharge the cargo above the Bridge, although in fact about seventy-five per cent. of the sugar now received at this port is so discharged. If this knowledge of the owners be urged against them, it may be answered that for this very reason they may have considered themselves protected by the terms of the charter-party, and in fact all previous notice, or understanding by either party must be regarded as merged in the charter party, and to the interpreting of that instrument resort must be had to ascertain the relative rights.

"The charter is stated by a witness connected with claimants' factory to be the same charter usually employed in the Java sugar trade, although the words 'always afloat' seem to have been interlined in the fourth subdivision. The essential question is whether the provisions of the charter already quoted relieve the ship from delivering cargo above the Bridge. For whatever purposes such stipulations were originally embodied in charter-parties, they have been retained and adopted for use in view of existing structures, and it is considered that the provisions are sufficiently broad to relieve the ship. This conclusion is reached through no ingenuity of construction but by giving to the language the meaning which might be ordinarily gathered from the words used. The initial agreement in the charter is to deliver the cargo at one of several ports, "so near the port of discharge as she may safely get, and deliver the same, always afloat, in a customary place and manner, in such dock as directed by charterers." This provision seems to be a direct stipulation to deliver the goods at any place where the ship might float, in such dock as directed by the charterers, in a customary place and manner, when such dock shall have been reached. The evident intention is that the ship shall go to the designated port, if she can get there in safety, and the continuing thought seems to be, that she shall deliver the goods in a dock designated by the charterers, in a customary place, and in a customary manner. Any intelligent construction would seem to demand that the ship would not be ordered to a dock where it would be unsafe for her to go, whether the danger arose from the depth of water, or any other cause. For instance, the ship could not be ordered to a slip which was too

narrow to receive her, or where there was some overhanging shed or house that would prevent. So, if the entrance to the dock were obstructed, or there was other interference with the discharge at the place designated.

"But section four is explicit, and states that the goods are to be taken from alongside the ship at the charterers' risk and expense, although they are permitted to direct her to the most convenient anchorage, and that any lighterage, either to reach the port of destination, or to deliver the cargo at such port, shall be paid by the receivers, notwithstanding any contrary custom of the port. Now, lighterage was necessary for the purpose of delivering this cargo after the ship reached the port of destination, for the reason that the ship could not make the delivery without such lighterage, unless she was mutilated by the cutting off of her masts. The proposition then is: if the charterers stipulate to pay the lighterage necessary for the purpose of delivering the cargo, may they be excused from observing this agreement upon the plea that no lighterage would be necessary if the masts of the ship were cut down to a certain length? It is thought that it is the privilege of the ship to be preserved from self-mutilation, and that she need not be crippled, deformed or dismantled for the purpose of delivering her cargo. Apparently that should never be required. It should not be expected. Rather than that it is expectable that the cargo should be lightered by the shipowners, and that they would pay for the same. But the expectation as to the person upon whom the payment of the lighterage should fall changes when it appears that there is a stipulation that the receivers shall themselves pay the lighterage. It is useless to conjecture respecting these stipulations, where they are, as in the present case, unambiguous. It is better to take words at their apparent ordinary meaning, and hold parties to their agreement according to the plain sense of the language used. Adopting such rule the libelant should recover (pp. 110-112).

"If what appears to the Court to be a plain statement of duties in this instance favorable to the libelant has quite other significance, yet it would be considered that the claimant should not succeed. The ship stipulated to deliver the cargo at one of many ports, and while it was undoubtedly her duty, after arriving at a designated port, to go to such point

therein as she could safely, it is thought that she would not be obliged to go to such point in the harbor at the peril of injury, or at the sacrifice caused by mutilation of her masts. It seems that in selecting a convenient dock for discharging in a harbor, the receivers of the cargo must select one which the ship can physically approach, and if there be a permanent structure in the way, the conception that the ship should not encounter this would seem to enter into the spirit and understanding of their agreement" (pp. 113, 114).

VII.—The Court of Appeals, in stating the facts, quoted that part of the opinion of the District Court which is given in folios 429-437, and further found, as did the District Court, that there was "no custom in the port of New York respecting the course to be pursued by vessels directed to discharge above the Bridge, which have immovable masts too high to permit a passage beneath the Bridge" (p. 121); and that "charters sometimes provide that the vessels shall not go above the Bridge, and sometimes that charterers have the right to order the ship above the Bridge, they paying the expense thereof" (p. 122).

VIII.—The Court of Appeals, however, disagreed with the conclusions of the District Judge and held:

(*a*) That the exceptional height of the vessel's masts and the unusual character of their construction alone interfered with the vessel's performance of her part of the contract, and that "unquestionably but for Article 4 she would have been obliged either to deliver or to pay for the damages occasioned by non-delivery at the Arbuckle dock" (p. 122).

(*b*) That although the question was not easy of solution (p. 122) the ship could place no reliance on the lighterage clause (4) of the charter-party under which she was acting, because "*the facts of this case are within the letter of the article, but not within its spirit*" (p. 124).

IX.—The reasons of the Court of Appeals were stated by Shipman, *J.*, as follows:

"On the construction of the two provisions of the charter-party which apparently are applicable to this case, the question, not easy of solution, arises.

"By Article 1, the vessel was to discharge as near the port of discharge as she could safely get, and deliver the cargo, always afloat, in a customary place and manner, at the dock directed by charterers.

"New York was one of the designated ports, and no question arises as to her safety. In this respect the facts of the case differ from those in "*Re* an Arbitration between Goodbody & Co., and Balfour, Williams & Co.," 8 Asp. Mar. Law, 303, in which Manchester was held not to be a safe port for the vessel in question, because, by reason of the height of her masts, she could not get under Runcorn Bridge, about twenty-four miles from Manchester and about twelve miles from the entrance of the canal, and the ship would have to be dismantled twenty-four miles from the port. The Benlarig was in the port of discharge, and the Arbuckle dock was a safe one where she could be always afloat, and a customary place for the discharge of sugar. The exceptional height of her masts and the unusual character of their construction alone interfered with the vessel's performance of her part of the contract, and, unquestionably, but for Article 4, she would have been obliged either to deliver or to pay for the damages occasioned by non-delivery at the Arbuckle dock. Article 4 provides that lighterage if any, to deliver the cargo at the port of destination is to be paid by the receivers, any custom of the port notwithstanding. The argument of the libelant by which the two claims are sought to be made harmonious, and in which the District Judge concurred, is that the cargo is to be delivered at the usual and customary place designated by the charterers or by the single consignee of the entire cargo; but if such delivery is prevented by a permanent cause, such as lack of depth of water or permanent obstructions at the port, and the cargo must be lightered, the expenses of such lightering are to be borne by the charterers. In the application of the construction, the libelant urges that as the Brooklyn Bridge prevented a delivery beyond it, and, as a mutilation or destruction of the ship's masts would be a serious injury and recourse must be had to

lighters, the state of facts provided for by Article 4 existed.

"Article 4 is a well known provision and was introduced into charter-parties originally to provide for the payment of lighterage when the vessel was unable to deliver the cargo at the dock to which she had been assigned from a cause to which vessels generally might be expected to be subject, such as shoal water or a bar, and if the Brooklyn Bridge was an obstruction to vessels generally or to such a proportion of vessels as to have become a well recognized impediment to navigation, the construction of the libelants would be correct. This form of charter is the one commonly used in the sugar trade for the purpose of meeting a customary condition of affairs in different ports, and in regard to which a custom of the port would naturally exist. The facts in this case were exceptional and eccentric. When vessels having too high masts which can be lowered are ordered to go above the Bridge, the masts are housed and the vessels proceed. In the rare instances which appear in the record of immovable masts of excessive height, they were cut. In this case, the vessel had steel masts of excessive height and a recent, exceptional and immovable method of construction, which makes the repair of the masts a serious affair. The owners knew or had reason to know of this peculiarity, but did not insert a provision in the charter that she should not be required to go above the Bridge, but preferred to rely upon Article 4. The case is that of the claimed application to novel circumstances of a clause intended for a different set of circumstances, and is as if a vessel, unable by reason of its novel construction to reach a dock which ninety-nine per cent. of vessels do reach, should desire to place the expenses of lighterage upon the charterers under Article 4. Such an attempt would be and the facts of this case are within the letter of the article, but not within its spirit" (pp. 122-124).

X. It is submitted that the Court of Appeals were in error in their conclusions on both branches of the case.

The Court say "The Benlarig was in the port of discharge, and the Arbuckle dock was a safe one where she could be always afloat, and a customary place for the discharge of sugar" (p. 122).

This, in effect, is a holding that the claimants fulfilled their duty to designate a safe dock by indicating a dock where there was sufficient water for the Benlarig to float, if she could reach it, and where many vessels could safely get, but where the Benlarig could not go without cutting her masts.

This charter-party, however, was made for a particular ship, the Benlarig, and the place designated for her discharge must be a safe one *for her* and one where she may discharge always afloat; otherwise the terms of the charter will not be fulfilled.

When the owners chartered their vessel they were not concerned with and doubtless did not consider the possible or probable capabilities of other vessels with respect to the various ports in the world. They were making a charter for their own vessel, whose qualities they knew, and they required that she should not be ordered by the charterers to any port or dock which was not safe for her, and was not one where she could discharge "always afloat."

It has been held in many cases that under clauses similar to the ones here considered the place of discharge must be one which the ship can float into, lie afloat in, and float out of (*The Alhambra* (1881), 6 Pro. Div., 68, in the Court of Appeal; *Shield* v. *Wilkins*, 5 Exch., 304; *The Nifa* (1892) Pro., 411; *Reynolds* v. *Tomlinson* (1896), 1 Q. B., 586; *Hayton* v. *Irwin*, 5 C. P. D., 130; 4 Asp. Mar. Law Cas., 212).

The *Alhambra*, the *Nifa*, and *Reynolds* v. *Tomlinson*, hold that a ship cannot be compelled to lighter cargo in order to enter a port; and by the same reasoning a ship in port should not be compelled to lighter cargo in order that it may reach a particular dock. Conversely, *Shield* v. *Wilkins*,

holds that a provision requiring a ship to proceed to a designated port or so near thereto as she could safely get, and there load a cargo, would not oblige her to enter the port to load, unless there was sufficient water for her to get out again with her cargo.

If these limitations apply to a safe port, it would seem that with equal weight they would apply to a safe dock in a port.

Mr. Elliott, one of the claimant's witnesses, says, (fol. 336) indeed, that under these clauses in a charter the custom here is that the charterer may order the vessel to a *safe* dock to discharge her cargo.

Judged by the qualifications required in the above cases the Arbuckles' dock was not a safe one for the Benlarig, for she could neither float into it nor out of it.

The reasonableness of such requirements seems obvious, irrespective of authority.

How can the dock be a safe one for the vessel if she cannot reach it?

The Benlarig would have had to lose about ten feet of her masts to go under the Bridge, loaded, and about twenty feet to come down lightened of her cargo.

Let it be supposed that the Brooklyn Bridge was a drawbridge and not more than 25 or 35 feet above the water instead of 135. If the width of the draw was sufficient to enable the large majority of all the vessels in the world to pass, but yet it was too narrow by only a few inches for the Benlarig, can it be supposed that she would be required to shave a few inches off her side planking to enable her to get through or else pay the cost of lightering the cargo?

Or if there was a draw bridge through which in ordinary course any ship might pass, but the draw was not in working order and could not be opened at the time the dock was designated to the vessel, must the ship bear such risk, and if she cannot

reach the designated dock, through by no fault of her own, must she pay the expense of lightering the cargo though she is ready to discharge directly at any dock she can safely reach?

As the District Judge suggests (fol. 115), "The ship could not be ordered to a slip which was too narrow to receive her or where there was some overhanging shed or house that would prevent."

But under this decision of the Court of Appeals, if there was such overhanging shed, and it was high enough to clear the masts of almost all vessels, but not sufficiently high to allow the Benlarig to lie at her dock, the ship must cut her masts, or pay to have her cargo lightened.

Or, again, if there was a bar in front of the dock, but yet sufficient water for almost all vessels to pass, but not enough for the Benlarig, must the ship then lighter at her own expense so much cargo as may be necessary to enable her safely to reach the designated place of discharge? The claimants would not so contend.

Illustrations might be multiplied, but they all would lead to the same conclusion. However preposterous the suggestions may seem they logically result from this extraordinary decision.

Indeed in their brief in the Court below (p. 12) the claimants admit that the ship would be excused if she should be ordered to a place "which by reason of some permanent physical obstacle, was inaccessible both to the Benlarig and to vessels of her size and class."

It is difficult for the petitioner to conceive any distinction between a permanent physical obstacle of one kind, which the claimants admit would excuse the vessel, and permanent physical obstacles of any other kind, which would not relieve the ship, though she would be affected in the same way, physically, by them all.

If there is in reason any such distinction, this

Court is asked to make it clear in order that ship-owners may be advised of the contingencies they may have to meet in chartering their vessels, so that when they have acted with reasonable human foresight with respect to obstacles that might be seen, they shall not subsequently be confronted with those that are unseen, but are conjured up by the "spirit" which the Court of Appeals has found so potent in this charter-party.

The Court of Appeals pass but lightly over the case of "*Re an Arbitration between Goodbody & Co. and Balfour, Williamson & Co.*, 8 Asp. Mar. L. C., 504, with the suggestion that the facts in that case differ from those here. The case is referred to at length in the opinion of the District Judge (fols. 446-454), who found the facts in the two cases to be equal (fol. 454).

In that case Manchester was held not to be a safe port for the Vanduara because the ship could not go up the Manchester Ship Canal to the Manchester docks because the heads of her main and mizzen masts were higher than the limit fixed by the Canal Company's regulations for passing under the Runcorn Bridge.

The contract of sale of the goods provided that the ship should discharge at any safe port.

The bills of lading contained the clause that the cargo should be delivered "at any safe port in United Kingdom, Manchester excepted." The consignees refused to accept the documents with that clause inserted, but the Court held that the words imposed no restriction on the purchaser inconsistent with the terms of the contract.

Bruce, *J.*, said (p. 507):

"*She could not have been ordered to Manchester in any case, because she could not have got under Runcorn Bridge*, and the presentation of documents containing the words 'Manchester excepted' im-

posed no restriction upon the purchaser inconsistent with the terms of the contract of purchase. * * * I may observe that *the contract was for a cargo per Vanduara, a named ship, and, if in point of fact Manchester was not a safe port for her*, it does not seem to me that the defendants were in any way prejudiced by a phrase being introduced into the documents which abridged none of their rights, and imposed no restriction which was not imposed by the terms of the contract itself."

On appeal the judgment of the Divisional Court was affirmed (5 Com. Cas., 59). A. L. Smith, *L. J.*, said (p. 66): "It is abundantly proved that Manchester, taken by itself, was not a safe port for this vessel, because it was found as a fact * * * that it would have been necessary to dismantle the ship to enable her to get under Runcorn Bridge, which is the first bridge vessels going up the canal to Manchester have to pass."

It is to be noted that the Vanduara would no more have had to be dismantled to pass under the Runcorn Bridge than would the Benlarig to pass under the Brooklyn Bridge.

In both cases the vessel's masts would have had to be cut. This circumstance was sufficient in the English case to keep Manchester out of the class of safe ports for the Vanduara; though Runcorn Lay bye below the bridge was part of the port of Manchester and could accommodate vessels not exceeding 5,000 tons.

The case in effect decides that an obstruction in the air which bars access to the place designated for discharge, quite as effectively prevents it from being safe for the ship as if the obstruction were a sand bar or any other obstacle below the water.

As was well said by the Court below (fol. 445):

"It is thought that it is the privilege of the ship to be preserved from self-mutilation, and that she need not be crippled, deformed or dismantled, for

the purpose of delivering her cargo. Apparently that should never be required. It should not be expected."

The Court of Appeals disagreed with this conclusion.

XI.—If there could be any doubt on the construction of the previous clause in the charter, it is altogether removed by the form of the lighterage clause 4, and it is submitted that the Court of Appeals committed a grave error in the construction which they put on it.

The lighterage clause in the charter-party, clause 4, was in these words:

"All goods to be brought to and taken from alongside of the ship, always afloat, at the said charterers' risk and expense, who may direct the same to the most convenient anchorage; *lighterage*, if any, *to reach the port* of destination, *or deliver the cargo at port of destination, remains for account of receivers, any custom of the port to the contrary notwithstanding*" (fol. 27).

The Court of Appeals say that this clause was "a well known provision, and was introduced into charter-parties originally to provide for the payment of lighterage when the vessel was unable to deliver the cargo at a dock to which she had been assigned from a cause to which vessels generally might be expected to be subject, such as shoal water or a bar" (p. 123).

The testimony of the most experienced witnesses for the claimants is directly to the contrary, and is to the effect that the form found here is unusual (*Snow*, fols. 299, 300; *Elliott*, fols. 344-346).

The usual form of the clause apparently is "Lighterage, if any, to be paid by the cargo" (*Snow*, fol. 300), or "Lighterage, if any, to be at the risk and expense of the cargo" (*Elliott*, fol. 352).

This is also seen by reference to the cases cited under this and the preceding point.

The clause in this charter-party is unusual in two particulars, in that it provides (1) that the Receivers are to pay for the lighterage, if any be necessary, *not only to reach* the port of destination *but also to deliver* the cargo at port of destination: and (2) that the lighterage shall be for account of the receivers "any custom of the port to the contrary notwithstanding."

Whether the clause was the usual one or not, it would seem that the error of the Court below was equally manifest. The Court found (p. 124) that the owners knew, or had reason to know, of the height of the Benlarig's masts, "but did not insert a provision in the charter that she should not be required to go above the Bridge, but preferred to rely upon Article 4."

This is a distinct finding that the owners thought that the language of the lighterage clause protected their vessel from going above the Bridge, and intended that it should do so. The stipulation itself is perfectly clear and unambiguous, and is an explicit agreement that if any lighterage is necessary, either to reach the port of destination, or deliver the cargo at the port of destination, the cost of such lighterage shall be paid by the receivers, any custom of the port to the contrary notwithstanding.

It must be remembered that the owners did not know when the charter-party was effected that the vessel was going to New York. The charterer had the choice of a wide range of ports. It may very well be that if any particular port had been contemplated, special provisions would have been put in to that effect; but as this was not the case, the provisions of the charter were made general to protect the ship in any contingencies which might arise. Even after the vessel arrived at the port of

New York, there were a half a dozen miles of piers on the North River, or on the East River below the Bridge which were perfectly suitable for the discharge of Java sugar, and where the vessel could have discharged in safety.

Nor is it any hardship whatever on the receivers that they should be held strictly to the terms of the documents which they bought.

The bills of lading expressly included all the conditions and exceptions of the charter-party. If, therefore, the claimants unadvisedly purchased the documents without sufficiently ascertaining the limitations which were placed on them thereunder, it would seem that they were not entitled, by reason of their ignorance, to increase their rights to the prejudice of the shipowner, who was a party to the original contract, and who should be bound only by the terms of the contract which he himself has made.

The fact that the goods were to be "taken from alongside of the ship always afloat at the said charterers' risk and expense," is of itself sufficient to put the cost of lighterage on the receivers (*Carr v. Austin*, 14 Fed., 419; *The Nifa*, 1892 Prob., 111).

If there could be any doubt as to this, it would be dispelled by the further direction that any necessary lighterage was to be for account of receivers.

There was an attempt on the part of the claimant to show that a custom existed at New York that the ship should pay the lighterage.

Both Courts have found, however, that there was no such custom. If there had been such, evidence of it would have been excluded by the language of the clause (*Brenda S. S. Co., Ld., v. Green* [1900] 1 Q. B., 518).

Indeed, it would seem that under any circumstances evidence of such a custom, even if it existed, would have been inadmissible (*The Nifa* [1892], Prob.,

411; 7 Asp., 324; *Holman* v. *Wade*, London *Times*, May 11, 1877, cited in the *Nifa*, 7 Asp., at p. 325; *Hagton* v. *Irwin*, 5 C. P. D., 130; 4 Asp., 212; *Lishman* v. *Christie*, 6 Asp., 186, 188; 19 Q. B. D., 333, 337).

Whatever the purpose for which a lighterage clause in some form may have been introduced in other charter-parties, the form of it as it occurs here was adopted by the owner to meet the circumstances of his own vessel, and must be regarded as expressing the agreement of the parties at the time it was made.

If the language used were ambiguous, and the meaning could not easily be understood, there might perhaps be some reason for the Court to look outside of the instrument itself in interpreting this clause.

No such situation is presented here.

The Court have found, if indeed a finding were necessary, that "the facts of this case are within the letter of the article," but they further state that they are "not within its spirit."

It is respectfully submitted that this finding is an attempt by the Court to change the contract actually made by the shipowner for some other contract more favorable to the receiver of the cargo which the Court thought should have been made, and that it constitutes a most unwarrantable invasion of the shipowner's vested rights.

XII.—The petitioner believes and avers that the question involved in this case is of such gravity and importance that it justifies the exercise of the jurisdiction vested in this Court to issue a writ of *certiorari* requiring the cause to be brought here for review from the Court of Appeals.

XIII.—Your petitioner presents herewith a certified copy of the transcript of record returned from

the District Court to the United States Circuit Court of Appeals for the Second Circuit, and of the record in the last named court.

Wherefore, your petitioner prays that this Honorable Court will cause the writ of *certiorari* to be issued pursuant to the power vested in this Court by the Judiciary Act approved March 3, 1881, requiring the said United States Circuit Court of Appeals, for the Second Circuit, to certify the whole record and cause to this Court for consideration, and that thereupon this Court will decide the whole matter in controversy between the parties.

And your petitioner will ever pray, &c.

ANTON MENCKE,
Petitioner.
By CONVERS & KIRLIN,
His Proctors.

STATE OF NEW YORK, }
County of New York, } ss.:

E. B. CONVERS, being duly sworn, makes oath and says: I am one of the proctors for the petitioner herein; I have read the foregoing petition, and the same is true to the best of my knowledge, information and belief. The reason why this petition is not verified by the petitioner is that the petitioner is absent at sea. The owners of the *Bedarig* reside in Scotland and have no officer nor agent in this country. This petition is made and presented by due authority, and the application is meritorious, and is not made for the purpose of delay.

E. B. CONVERS.

Subscribed and sworn to }
before me, this 27th }
day of April, 1901. }

CHARLES R. HICKOX,
[SEAL.] Notary Public,
New York County.

I hereby certify that I have examined the foregoing petition, and that, in my opinion, it is well founded, and is entitled to the favorable consideration of the Court.

J. PARKER KIRLIN,
Advocate.

No. 90.

NOV 19 1902
JAMES H. McKENNEY,
Clerk

Brief of Kirlin & Hickox for Co

SUPREME COURT OF THE UNITED STATES

Filed Nov. 11, 1902.

OCTOBER TERM, 1902

No. 90

Anton Mencke

Libelant-Petitioner

against

A Cargo of Java Sugar, *ex* Ship Benlarig

James N. Jarvie *et al.*

Claimants

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE LIBELANT-PETITIONER

CONVERS & KIRLIN

Proctors for Libelant-Petitioner

J. PARKER KIRLIN

CHARLES R. HICKOX

Of Counsel

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1902.

ANTON MENCKE, Libelant, Petitioner, AGAINST A Cargo of Java Sugar ex-Ship BENLARIG, JAMES N. JARVIE *et al.*, Claimants.	No. 90

BRIEF FOR LIBELANT-PETITIONER.

This cause is before the Court pursuant to a writ of *certiorari* issued to the United States Circuit Court of Appeals for the Second Circuit.

The action was begun by the filing of a libel on May 27, 1899, in the United States District Court for the Eastern District of New York by the master of the British ship Benlarig, against a cargo of sugar that had just been delivered from the vessel, to recover an unpaid balance of freight due for carrying the sugar from Java to New York (pp. 1–13).

The receivers of the cargo, the claimants in this action, had deducted from the freight the cost of

lightering the cargo from the dock where it had been discharged to the claimants' refinery, which was above the Bridge. The ship had been ordered by the claimants to proceed directly to the refinery, but had been unable to do so because the height of her masts was such that she could not pass under the Bridge.

The District Court, Judge Thomas, entered a decree in favor of the libelant, January 18, 1900, (pp. 85, 86; 99 Fed. R. 298).

The claimants duly appealed to the United States Circuit Court of Appeals for the Second Circuit, who, on April 16, 1901, reversed the decree and remanded the cause with instructions to dismiss the libel (p. 92; 108 Fed. R. 87). The libelant then petitioned this Court for a writ of *certiorari* and the present writ was granted on May 13, 1901 (181 U. S., 620).

These are the facts :

The ship Benlarig was chartered under a charter-party dated London, July 1, 1898, between Watson Brothers, her owners, and Erdmann & Sielcken, merchants of Batavia, Samarang and Sourabaya.

The charter-party provided that the Benlarig should load at Java " a full and complete cargo of dry sugar in baskets and /or in bags " " and being so loaded * * * shall (unless ordered to a direct port of discharge on signing last bills of lading) therewith proceed to Barbadoes, thence to Queenstown or Falmouth (as directed by chaterers or their agents) for orders, to discharge

always afloat, either at a *safe* port in the United Kingdom or on the Continent of Europe between Havre and Hamburg (both included), Rouen excluded, or at option of charterers to order vessel from Barbadoes to proceed to Delaware Breakwater for orders to discharge at New York or Boston or Philadelphia or Baltimore, *or so near the port of discharge as she may safely get* and *deliver the same, always afloat*, in a customary place and manner, in such dock, as directed by charterers, agreeably to Bills of Lading." * * * (*Rec.*, pp. 3, 4).

The charter party further provided Section 4:

"All goods to be brought to and taken from alongside of the ship, always afloat, *at the said charterers' risk and expense*, who may direct the same to the most convenient anchorage; *lighterage*, if any, *to* reach the port of destination, or *deliver the cargo at port of destination, remains for account of receivers, any custom of the port to the contrary notwithstanding*" (*Rec.*, p. 5).

The Benlarig duly loaded a full cargo of sugar in Java as provided by the charter-party (*Ans.*, p. 13), and then proceeded to Barbadoes. She was there ordered to proceed to New York, which she did directly (*Meucke*, p. 17).

Bills of lading or receipts had been issued at the ports of loading, reciting the shipment of the quantities of sugar noted in the margin thereof. All the bills of lading contained the identical conditions that the sugar was "to be *delivered* in the like order and condition at the port of discharge *as per charter-party* dated London 1st July, 1898

(the dangers of the seas excepted) unto Messrs. Winter & Smillie as agents or to their assigns, he or they paying freight for the said sugar as per charter-party. General average, if any, to be settled according to York-Antwerp rules 1890. *All other conditions and exceptions*, negligence and Harter Act clauses included, *as per charter-party* above referred to with average accustomed" (*Libelant's Ex.* 3, 4, 5 and 6; pp. 17–20).

Before or about the time of the arrival of the Benlarig at the port of New York the cargo and the ship's documents, including the above mentioned charter-party and bills of lading, were sold and transferred by their owners to the firm of Arbuckle Brothers (*Ans.*, p. 13, *Gilmour*, p. 79). This firm claimed to be the owners of the cargo and were in possession of the charter-party and bills of lading on the ship's arrival (*Gilmour*, pp. 78, 79). The delivery of the sugar was made to Arbuckle Brothers (*Ans.*, p. 13).

The vessel arrived at New York on April 14, 1899, and on April 15, notice of her arrival and entry at the Customs House, together with a request for orders for a discharging berth, were sent to the claimants by the vessel's agents (*Libelant's Ex.* 9, p. 22). At the same time the claimants were notified that the vessel's masts being in one piece would not admit of her passing under the Brooklyn Bridge (p. 22).

Notwithstanding this notice, the claimants, after conferring with their London house (*Libelant's Ex.* 10, p. 23), gave the vessel orders to dis-

charge at their refinery at the foot of Pearl street, Brooklyn (*Libelant's Ex.* 7, p. 21). The place of discharge thus selected by the receivers, who stood in the position of the charterers, was above the Brooklyn Bridge.

The clear height of the central span of the Brooklyn Bridge above mean high water is 135 feet (*Martin*, p. 135).

The average rise and fall of the tide from 1893 to and including 1898 was 4.5 feet (*Spaulding*, p. 38). The daily tide record from April 15 to May 2 is before the Court (*Spaulding*, pp. 37–38). This record shows that the actual rise and fall did not vary materially from the average or mean rise and fall.

At dead low water, therefore, there were not more than 140 feet in the clear at the highest point.

The Benlarig is a three-masted, square-rigged ship (*Mencke*, p. 33). She had three steel masts, built up solid from the bottom to the top. They were constructed of cylindrical steel plates, riveted together with internal angle iron braces.

There was no way of taking any part of the masts down (*Mencke*, p. 28).

The mainmast was 139 feet 10 inches above the deck. The deck at that point was 5 feet 2½ inches above the deep water load line. The total height of the mainmast above the load line was therefore 145 feet ½ inch (*Mencke*, p. 27).

The foremost was 136 feet 8 inches above the deck, but the height of the deck above the water

line at that point is 7 or 8 feet, so that the height of the foremast was 143 feet 8 inches, or 144 feet 8 inches above the load line, or within several inches of the height of the mainmast (*Meucke*, p. 27).

The mizzenmast was 129 feet above the deck, and the deck was 7 feet above the load line. The mizzenmast thus was 136 feet above the water line (*Meucke*, p. 27).

On this occasion the vessel was loaded down to her Plimsol line (*Meucke*, pp. 30, 33).

The ship, therefore, required 145 feet of clear space in order to pass underneath the Bridge. This was 5 feet more than the height in the clear of the highest point of the Bridge when the tide was at the lowest point of the ebb. An additional margin of several feet probably would have to be allowed on account of disturbance or movement of the water. At dead low water, therefore, the Benlarig could not pass under the Bridge without cutting off 8 or 10 feet from her steel masts.

This was a mutilation to which it was thought the charterers could not properly subject the ship.

Accordingly on receipt of the claimants' orders on April 15th (*Libelant's Ex.* 7, p. 21), the vessel's agents again notified the claimants that it was impossible for the ship to pass under the Bridge, and they asked for further orders for a discharging berth (*Libelant's Ex.* 11, p. 23). No immediate reply was received to this request, and on April 18th the ship's agents again wrote to the

claimants asking for another discharging berth and adding that in default thereof the cargo would be discharged at some safe point below the Bridge and would then be lightered to the dock already designated by the claimants. The agents further stated:

"If this be your determination, please name the point and send the lighter. We shall look to you and the cargo to pay lighterage in accordance with clause No. 4 of the charter-party" (*Libelant's Ex.* 13, p. 25).

The claimants then gave orders for the Benlarig to go to West Central Pier, Atlantic Dock, below the Bridge, to which place they stated that they would send lighters to take the sugar from the vessel to the refinery. They also gave notice at the same time:

"We do this in order to save any further delay in discharging vessel, but we beg to distinctly advise you that this action of ours does in no way prejudice our position as regards liability for the lighterage expenses of the cargo, which we claim, under the Charter-Party, is payable by the Ship and her owners. The question as to the parties liable for expenses of lighterage can be settled later, but we distinctly disclaim all liability" (*Libelant's Ex.* 12, p. 24).

It was finally agreed that the discharge of the cargo into lighters at the West Central Pier should be without prejudice to the rights of either party under the charter and without waiver of the ship's lien on the cargo for the balance of freight or of the claimants' contention that the ship was bound to go above the Bridge, or to pay the cost

of lighterage if she unloaded below it (*Ans. to 2nd Int.*, p. 15.).

The cost of the lighterage was $1,466.12. This sum was paid by the claimants and a like amount was deducted by them from the freight (*Gilmour*, pp. 75, 79).

In this suit to recover the balance of freight so withheld, the sole controversy is as to which party should pay these lighterage charges, assuming that the ship could not pass under the Bridge without cutting at least two and probably her three masts, and that she declined to accept orders to discharge her cargo above the Bridge for that reason (*Libelant's Ex. 13*, p. 25).

The libelant's contention is that :

(1.) The right of the receivers, under the clause of the charter-party heretofore quoted (*ante*, pp. 2, 3), to select the dock for the discharge was subject to the limitation that such dock must be one that was safe and suitable for the ship as well as for the cargo and one to which the ship could proceed without hindrance by permanent obstacles, which she could not pass without being mutilated, crippled or dismantled.

(2.) Under clause 4 of the charter-party (*ante*, p. 3), any lighterage necessary to deliver the cargo at the port of destination must be paid by the charterers.

The claimants, in effect, contend that :

(1.) Their right under the charter-party was so

absolute that they could designate a dock above the Bridge although the Bridge was too low for the vessel to pass thereunder.

(2.) The ship was bound to deliver her cargo at the designated dock even though her masts should have to be cut to enable her to reach the dock, or in the alternative that the vessel should have the cargo lightered to the dock at her own expense.

(3.) That by the custom of the port the lighterage clause in the charter-party does not mean what it says.

The District Court, Judge Thomas, sustained the libelant's contention and said, with respect to the clause giving the charterers the right to designate the port and dock of discharge (p. 83):

"The evident intention is that the ship shall go to the designated port, if she can get there in safety, and the continuing thought seems to be, that she shall deliver the goods in a dock designated by the charterers, in a customary place and in a customary manner. Any intelligent construction would seem to demand that the ship would not be ordered to a dock where it would be unsafe for her to go, whether the danger arose from the depth of water, or any other cause."

The Court held further that the lighterage clause, Section 4, was explicit (p. 83); that lighterage was necessary for the purpose of delivering the cargo after the ship reached the port of destination (p. 83); that the stipulation was clear and unambiguous that the receivers of the cargo should pay the cost of the lighterage (p. 84). Accordingly a decree was rendered for the libelant (pp. 85, 86).

The Court of Appeals approved the findings of fact of the District Court (pp. 88, 89), and they further found that there was no custom in the port of New York respecting the course to be pursued by vessels which are directed to discharge above the bridge, but which have immovable masts too high to permit a passage under the bridge (p. 89). Instances of such vessels are rare (p. 90).

The Court, however, by Shipman, *J.*, differed from the District Court's conclusions, and assumed and found that the dock to which the vessel was ordered was a safe one, where she could be always afloat, and a customary place for the discharge of sugar (p. 90). But the Court did not find that it would have been possible for the Benlarig to reach the dock safely.

As to the lighterage clause, the Court held that it was a well known provision, and they deduced a reason for its insertion originally in charter-parties: that the clause contemplated cases where there was an obstruction that affected vessels generally, and this was not such a case; but that the Brooklyn Bridge might be regarded as such an obstruction if it affected a sufficiently large proportion of vessels (p. 91). It was not indicated, however, just when the Rubicon would be reached, nor how many vessels like the Benlarig, with a similar charter clause, would have to come to the port, nor how often, before the clause would become operative on one of the vessels. It sufficed the Court that though the clause in its language fitted the present case, yet, in their opinion, the "spirit"

was antagonistic, and its influence was so potent that it nullified the language (p. 91); all application of the clause was, in effect, denied, and the decree of the lower Court was reversed (p. 92).

FIRST POINT.

THE RECEIVERS' RIGHT UNDER THE CHARTER-PARTY TO SELECT A DOCK IS NOT ABSOLUTE AND UNRESTRICTED. THE DOCK SELECTED MUST BE SAFE AND SUITABLE FOR THE SHIP, AND ONE THAT SHE CAN *SAFELY* REACH.

The clause in the charter-party under which the Receivers claim the right to require the ship to dock above the Bridge is printed at pp. 2 and 3 of this brief. The material parts are here repeated:

"To discharge always afloat, either at a safe port in the United Kingdom or on the Continent of Europe, between Havre and Hamburg, both included, Rouen excluded, or at option of charterers to order vessel to Barbadoes to proceed to Delaware Breakwater for orders to discharge at New York or Boston or Philadelphia or Baltimore, or so near the port of discharge as she may safely get, and deliver the same always afloat, in a customary place and manner, in such dock as directed by charterers agreeably to bills of lading" (p. 4).

The bills of lading to which reference is made in this clause provide that the cargo is to be delivered "as per charter-party" on payment of freight, etc. "All other conditions and exceptions * * * as per charter-party, dated Lon-

don, 1st July, 1898." The fact that the charter-party is referred to by its date makes the reference even more specific than if it had been merely part of the general printed form in the bills of lading and shows that the parties to the bills of lading had this particular charter clearly in mind.

The terms of the charter-party, therefore, are directly brought to the notice of the holders of the bills of lading, and so far as the conditions and exceptions of the charter are pertinent to the selection of the place of discharge, the claimants as purchasers of the bills of lading and the charter-party are to be regarded in no other or better position than if they had been charterers originally instead of assignees with notice (*Carver, Carriage by Sea* (3d Ed), p. 160; *Pollard* v. *Vinton*, 105 U. S. 7; *The Asphodel*, 53 Fed. R., 835; *The Chadwicke*, 29 Fed. R., 521).

If this clause, then, is considered by itself for the moment, it is seen that the contract was not a simple one to carry a cargo from Java to New York, and there discharge it "in such dock as directed by charterers." Even in such a case it is not believed that the charterers would have had a right to select a dock which the ship could not safely reach.

The contract, in fact, was one which gave the charterers a choice of a wide range of ports, at any one of which they might have ordered the ship to discharge. The clause must be taken as drawn generally to meet any possible contingency that might arise in the event of discharge at any

particular port. Within this range of ports there doubtless are many bridges of much less height above high water than the Brooklyn Bridge. It cannot be presumed that under the language here used the shipowners intended to give the consignees the right to order the vessel to discharge above such a bridge, which would have compelled her to unship her masts or cut them in two, or incur the expense of lighterage however great that might be. The language of the clause does not suggest any such intention. There is nothing in the charter-party from which it can be gathered, yet it is in effect the claimants' contention.

It logically results from the decision of the Court of Appeals that when once the vessel has safely reached a port, the charterers' obligation is satisfied and they may then order the vessel to proceed to any dock where some vessels customarily go, if only the particular vessel can be afloat at it. And the fact that to reach this dock the vessel might be obliged to cut several feet off her masts, or indeed, become completely dismantled, would not excuse her from complying with the order, or from bearing the cost of getting the cargo to the designated place by some other method, as by lighters, as in this case. Such a result seems so inequitable that it should be avoided unless it should be necessitated by a mandatory construction of the charter.

So far as an alternative method of discharge is concerned, there was no other, practically, than the use of lighters.

The suggestion was made at the trial for the first time that the designated dock was accessible by way of the Long Island Sound, and that the Benlarig, on receiving orders to discharge at the refinery above the Bridge, should have sailed out through the Narrows, around Long Island and Montauk Point and then through the Sound and Hell Gate to the dock at the refinery.

The idea is rather whimsical under the circumstances. It certainly was never put forward by the claimants themselves during the negotiations, and no request for such procedure was ever made by them to the libelant.

Referring to this suggestion the District Court said (p. 82):

> "There were but two means of escaping this mutilation of the masts for the purpose of discharging the cargo; first by approaching New York from the east, through Hell Gate. All shipping experts called by the claimants testified that they had never heard of a ship from Java pursuing that course. It may, therefore, be concluded that such alternative was contrary to the expectations and understanding of all parties to this contract, or of any other contract for the carriage of sugar from Java. The remaining alternative was to lighter the sugar."

This finding is concurred in by the Court of Appeals (p. 89), and may fairly be regarded as conclusive.

The question then is whether the vessel was bound to have her steel masts cut as the only means by which she would be enabled to reach the pier selected for her. The very statement of

the question would seem to carry with it a negative answer.

The claimants proved in their own evidence that the owners of the Benlarig knew as early as 1893 that the vessel could not pass underneath the Bridge (*Rossen*, p. 80).

There is no evidence to show that the claimants knew the height of the Benlarig's masts. They contend indeed, as stated in their brief in the court below (p. 17), that they

> "had no reasonable way of ascertaining such height. There was no circumstance to put them upon their inquiry. Masts of such height in one piece are so rare as not to charge merchants with the responsibility of investigation."

But if it be assumed, as may well have been the case, that the claimants bought the cargo and the ship's documents in ignorance of any of the details of the construction of the Benlarig, yet they had no right to make any assumption whatever at the risk of the shipowner, as to the height of the vessel's masts. The owners made no representation, and certainly it cannot be urged that the claimants bought the documents of the ship and cargo on the understanding that she belonged to any particular class of vessels of any height of masts or depth of keel that might be familiar to them. The claimants may well have been ignorant in fact, but that should be no reason to charge the owners with responsibility therefor.

Indeed it has been held by high authority that the charterer will be presumed to know the size

and characteristics of the vessel. In *Belmont* v. *Tyson*, 3 Blatchf., 530; 3 Fed. Cas., 150, where the shipowner had sued the charterer for failure to supply a full cargo to the vessel at Apalachicola, Mr. Justice Nelson, said:

"It is insisted on the part of the charterer, that he was not bound to furnish cargo beyond the quantity which the vessel could receive within the passes, and get safely out to sea. The owner claims, however, that he was entitled to have a full cargo, and that the charterer was bound to furnish outside the remainder necessary to complete it; and this upon the principle that *the charterer must be presumed to have known the size and character of the ship*, and the state of the harbor at the place of loading, and that a full cargo could not be put on board unless a part of it were to be taken in outside of the passes."

The decree of the District Court in favor of the libelant was affirmed.

The relative rights of the shipowner and charterer or consignee under this contract had been fixed before the claimants became parties. Their ignorance of the extent of the obligations assumed by them by their purchase of the contract cannot relieve them from liability for due performance of their burden under the contract.

The District Court cogently found on this point as follows (p. 82):

"Before considering the charter-party it should be stated that the ship had been before at the port of New York and the owners well knew that she could not pass under the Bridge without disturbing her masts. It is not understood that the charterers had this knowledge. On the other hand there is no notice to the ship that it would

be necessary to discharge the cargo above the Bridge, although, in fact, about seventy-five per cent. of the sugar now received at this port is so discharged. If this knowledge of the owners be urged against them it may be answered that for this very reason they may have considered themselves protected by the terms of the charter-party, and, in fact, all previous notice or understanding by either party must be regarded as merged in the charter-party and to the interpreting of that instrument resort must be had to ascertain the relative rights."

In view of such knowledge therefore it would be folly to suppose that the owners would intentionally agree to have the vessel go to a dock which she could not safely reach.

The charter shows that they did not make any such agreement. The language of the clause (*ante*, p. 11) provides several well defined restrictions governing the choice by the charterers of the place of discharge.

If these restrictions are considered by themselves in turn it is seen first that the place must be one where the vessel can discharge "always afloat."

There can be no dispute as to the meaning of these words. The vessel must be able to float at all times during the discharge, and this restriction carries with it the corollary that the vessel shall be able to float into the place and also to float out again after the discharge. Otherwise there would be no protection to the ship if she could not reach the place of discharge, or could not leave it afterwards, afloat.

The next condition is that the place of discharge must be "a safe port in the United Kingdom, or on the continent of Europe, between Havre and Hamburg, both included, Rouen excluded."

These words show that the port selected must be a safe one within certain territorial limits. Rouen is expressly excluded, whether as unsafe or for any other reason, but the safe and unsafe ports are not otherwise specified. Evidently, whether a particular port was safe or unsafe was a matter to be determined by the circumstances of the case. Indeed, Hamburg was included within the territorial option without a determination of the question of its safety, although it has been judicially held that Hamburg is not always to be regarded a safe port (*Hayton* v. *Irwin*, 4 Asp., N. S., 212; in the Court of Appeal.)

In the third place the charterers might, at their option, order the vessel to discharge at any one of four ports named, New York, Boston, Philadelphia, or Baltimore, but there is the further restriction, that may well be regarded as applying to all that part of the clause that precedes and to include any port to which the vessel might be ordered: "or so near the port of discharge as she may safely get."

This is a plain recognition that the vessel may not be able to reach the place of discharge, and if so, she need proceed only so far as she can safely get. If the influence of the restriction be confined to the four named ports in the United States it is all the more significant.

If the vessel should not be able to reach safely the place of discharge, we should expect to find some provision with regard to the liability for the expense of discharge of the cargo from the vessel in her more or less distant position. There is such provision in the lighterage clause 4, but this will be considered hereafter.

The next condition is almost a repetition of the first, and that is that she shall "deliver the same always afloat, in a customary place and manner."

The District Court construed this phrase as indicating that the discharge should be in a customary place and manner, when the dock shall have been reached (p. 83), and this view is doubtless correct.

The Court of Appeals did not refer to this construction, beyond holding that the dock to which the vessel was ordered was a customary place for the discharge of sugar (p. 90).

The claimants insisted that the District Court was in error in the view taken by it, and that they had complied with all their obligations by merely designating a customary place of discharge.

The claimants' contention, however, would in effect, remove the phrase from its context, and would regard the requirement that the discharge should be in "a customary place and manner" as constituting the only protection sought by the shipowner, rather than as forming merely one of several qualifications on the receivers' right of selection that otherwise might be claimed by them to be unrestricted.

The probability is, however, that the words "in a customary place and manner" have little bearing on the point here in controversy. The complete phrase is "deliver the same always afloat, in a customary place and manner, in such dock as directed by the charterers." The words, "in a customary place and manner," qualify the words "in such dock," and are evidently intended to apply to cases where, as in England and Holland, docks are enclosed by tide gates, and there are many berths in the same dock (*Dall'Orso* v. *Mason*, 3 Scotch Sessions Cases (4th Series), 419; *Dahl* v. *Nelson*, 6 App. Cas., 38; *Pyman* v. *Dreyfus*, 24 Q. B. D., 152; *Carver, Carriage by Sea* (3d Ed.), Sec. 624 *b*).

The language in this entire clause has frequently been the subject of judicial decision, and it has been held that a vessel would not be bound to lighter cargo in order to get to the port or place of discharge, nor to enter a port to load if she would be compelled to lighter cargo in order to leave. A few of these decisions are here referred to.

The Alhambra (1881), 6 P. D., 68, in the Court of Appeal, was a case where the charter-party provided that the vessel should go "to a safe port in the United Kingdom * * * or as near thereunto as she could safely get, and always lay and discharge afloat. * * * Lighterage (if any) always at the risk and expense of the cargo."

The vessel received orders to proceed to Lowestoft and there discharge the cargo. The vessel's draught was 16 feet 6 in. The average high water in Lowestoft harbor was about 16 feet and average low water about 11 feet. When the master objected to discharging in Lowestoft the purchasers of the cargo gave him notice that they were prepared at their own expense to lighter the vessel in Lowestoft Roads sufficiently to enable her to lie always afloat in Lowestoft harbor, if necessary, should her draught of water so require. The master declined this, however, and went to Harwich as the nearest safe port and discharged the cargo. The owners of the cargo brought suit for breach of contract and at the trial it was shown that it was the custom for vessels which were too deep to enter the port of Lowestoft to discharge a portion of their cargo in the Roads outside, and that it could be done with reasonable safety.

Judgment was given for the plaintiffs. On appeal the judgment was reversed. It was held that Lowestoft was not a safe port for the vessel within the meaning of the charter-party and that the custom shown by the charterers was inadmissible.

JAMES, *L. J.* (p. 74), said:

"That is the place to which she has contracted to go. She has not contracted to go somewhere something like it, or with a little variation from it, or a little change from it which the party ordering her to go may require. The master says, 'No, you must name me a port and I will go to that port if I can get there, and if from any accident afterwards, or from any cause not my own fault I cannot get there, I will get as near thereto as I can safely get

still complying with the conditions given me at first; that is to say, to go to a port where I can get and safely lay and discharge afloat."

COTTON, *L. J.*, said (p. 74):

"A safe port here means a port safe for this vessel loaded, that is to say, one into which such a vessel loaded can safely get."

In *Reynolds* v. *Tomlinson* (1896), 1 Q. B., 586, the language in the charter-party was that the vessel should proceed to one of several named ports "for orders to discharge at a safe port in the United Kingdom * * * discharge to be given with dispatch according to the customs of the port of discharge and to be all at one port * * * Charterer's agent to have the privilege of naming the discharging dock. * * * The dock to be one into which the vessel can at once safely enter and lie afloat at all times."

The vessel received orders to discharge at Gloucester. The town of Gloucester and the Gloucester Basin are approached by a canal. The ship with her cargo on board drew 18 feet, while the depth of the canal accommodated vessels of not more than 14 feet draft. In order to get up the canal to Gloucester the vessel would have had to discharge at Sharpness at the entrance to the canal, 465 tons out of a total cargo of 1069. The charterers required the master to lighten the ship to that extent at Sharpness and then proceed to Gloucester to discharge the remaining cargo. The master refused to do this and discharged the whole cargo at Sharpness. The charterers sued

the shipowner for the excess cost of the discharge of the 604 tons into lighters above what it would have cost to discharge that amount at the dock at Gloucester.

At the hearing the Judge found that there was a custom at the port of Gloucester, according to which ships employed in the grain trade, if of too great a draught to navigate the canal, were invariably lightened by the discharge of part of their cargo at Sharpness, and then proceeded to Gloucester with the remainder. He also found that for fiscal purposes Sharpness is in the port of Gloucester, though in a commercial sense Gloucester and Sharpness are distinct ports. Judgment was given for the charterers, but on appeal the judgment was reversed. The Court said, DAY, *J.* (p. 589):

"The charter-party provides that the port to which the ship is ordered to go must be a safe port. The port to which she was in fact ordered to go, was Gloucester, and that was in my opinion, not a safe port for this ship for she could not get safely there with her cargo * * *."

(p. 590): "He had got as near to Gloucester as he could safely get and was entitled to call on the consignees to take delivery at Sharpness."

The Court held under the authority of the *Alhambra*, 6 P. D., 68, that the evidence of the custom to lighten the ships was inconsistent with the provision of the charter-party, that the port of discharge should be a safe port.

In *Shield* v. *Wilkins*, 5 Welsby H. & G. (Exchequer), 304, the charter-party provided that the vessel should proceed to Riga "or as near thereto

as she could safely get," and there load a full cargo of fir timber. The vessel arrived inside the bar at the port of loading and loaded all the cargo she was capable of taking, consistently with her being able to get out of the harbor over the bar. The charterers refused to give any cargo outside the bar at the charterers' expense, and the shipowner brought an action for dead freight.

The court held that the plaintiff was entitled to recover. It was said by ROLFE, B., at page 304:

"It is perfectly clear what the meaning of this contract is—that the vessel cannot be said to get safely to that place from which she cannot safely get away with a full cargo. The word "safely" means safely as a loaded vessel. Suppose the place to have been such that she could not have taken in with safety to herself a single deal, that would not have been a place whereto she could safely get; and, consequently, as she could not safely get away from within the bar with a full cargo, that was not such a place within the terms of this charter-party."

In *The Nifa*, 1892 Prob. Div., 411, the charter-party provided "the cargo to be brought to and taken from alongside the ship at merchants' risk and expense, where she can lie always afloat and safe * * *, and being so loaded shall therewith proceed to Yarmouth, Norfolk, or so near thereto as she may safely get, and deliver the same always afloat * * *. The cargo to be supplied as fast as steamers can load and stow same and discharge as fast as steamers can deliver and according to custom of the respective ports." The vessel arrived and was moored 15 feet from the

quay, which was the nearest position the ship could reach always afloat. To enable the cargo to be discharged it was necessary to have a staging built. For the extra cost of the discharge in this manner, the shipowner brought an action against the charterers.

The defendants at the trial set up a custom at the port by which the vessel was to deliver on to the quay. Judgment was given for the defendants. On appeal the judgment was reversed. It was held that evidence as to the custom was not admissible. SIR FRANCIS JEUNE said (p. 417):

"It appears to me that you may very well say that the words 'according to the custom' in the latter clause do not modify 'at the merchants' risk and expense,' but may control the time and manner in which the cargo is to be loaded, stowed and discharged."

A. L. SMITH, *J.*, said (p. 418), as to the words "and according to the custom of the respective ports" as follows:

"I read those words as meaning the mode of loading and unloading, or it may be as to where the goods are to be delivered, but that does not contradict that part of the contract which is staring one in the face, namely, that the taking to and from the ship's rail is at merchants' expense. I say in my view this is a clear case."

In *The Gazelle*, 128 U. S., 474, the charter-party provided that the vessel should proceed from Baltimore "to a safe, direct Norweigian or Danish port as ordered on signing bills of lading or as near thereunto as she can safely get and always lay and discharge afloat."

The charterers tendered to the master for signature bills of lading ordering the vessel to the Port of Aalborg in Denmark as the port of discharge "to be landed at Aalborg, or as near thereto as the vessel can safely get." The master refused to sign for the reason that Aalborg was not a safe port. Aalborg is situated in Denmark on the south bank of the Limiford, and about 17 miles from its mouth. Owing to a bar at the mouth of the river, there is a depth of water of 10 or 11 feet only. The draft of the Gazelle loaded was about 16 feet. The only place of anchorage for a vessel that cannot cross the bar is off the mouth of the river, where vessels were accustomed to discharge into lighters.

Subsequently the master filed a libel for demurrage to the vessel. Judgment was given for the libelant. On appeal the decree was affirmed. This court, speaking by Mr. Justice Gray, said (p. 486):

"By the express terms of the charter-party, the charterers were bound to order the vessel 'to a safe, direct, Norwegian or Danish port, or as near thereunto as she can safely get and always lay and discharge afloat.' The clear meaning of this is that she must be ordered to a port which she can safely enter with her cargo, or which, at least, has a safe anchorage outside where she can lie and discharge afloat. *Dahl* v. *Nelson*, L. R. 6 App. Cas., 38; *The Alhambra*, *L. R.* 6 P. Div., 68. The charterers insisted upon ordering her to the Port of Aalborg. The circuit court has found that Aalborg is in a *fiord* or inlet having a bar across its mouth, which it was impossible for The Gazelle to pass, either in ballast or with cargo; and that

the only anchorage outside the bar is not a reasonably safe anchorage, nor a place where it is reasonably safe for a vessel to lie and discharge.

"These positive findings of essential facts are in no way controlled or overcome by the other statements (rather recitals of portions of the evidence than findings of facts) that large English steamers habitually, and thirty-one American vessels in the course of several years had, in fact, discharged the whole or part of their cargoes at that anchorage, without accident or disaster. A dangerous place may often be stopped at or passed over in safety."

The charterers offered to prove that by the uniform and established custom of trade between Baltimore and other Atlantic ports and ports of Norway and Denmark, Aalborg was recognized as being and understood to be a safe, direct port of Denmark within the meaning of such charter-party. The Court held that "evidence of a custom to consider as safe a particular port, which, in fact, is not reasonably safe, would directly contradict the charter-party, and would, therefore, be incompetent as a matter of law.

In *Hayton* v. *Irwin*, 4 Aspinall, N. S. 212 (in the Court of Appeal), the charter-party provided that the vessel should proceed "to a safe port in the United Kingdom or on the Continent, between Havre and Hamburg, both ports included, as ordered * * * or so near thereunto as she can safely get * * * The cargo to be brought to and taken from alongside the ship at merchant's risk and expense."

The vessel was ordered to discharge at Ham-

burg and her draught was too great to allow her to get up the river higher than Stade, and she could not reach Hamburg. Part of the cargo was lightered at Stade and carried to Hamburg, and the balance of the cargo was taken up in the vessel after she had been lightened.

The shipowner sued the charterers for the expense of lighterage. The charterers set up a custom of the port of Hamburg by which he was not bound to accept any part of the cargo at any other place than Hamburg. It was held that the custom could not override the charter-party, and judgment was given for plaintiff, and on appeal was affirmed.

It is particularly to be noted in this case that Hamburg was included by name in the range of ports to which the charterers might order the vessel to proceed. It is clear that it was considered that Hamburg might or might not be a safe port according to the circumstances of the vessel. In fact, it appeared that Hamburg was not a safe port for the vessel within the language of the charter.

If the limitations referred to in these cases apply to a safe port they would seem to apply with equal force to the place of discharge or a safe dock in the port, for there can be no distinction in reason between a port that has but one dock or place of discharge and a port that has several docks, some of which are safe and some unsafe for the vessel. What the ship is entitled to demand

in each case is safety. Indeed, one of the claimant's witnesses said that the language of the clause by custom gave the charterers the right to order the vessel to a *safe* dock (*Elliott*, p. 63).

The result of these decisions is that charter-party provisions are to be construed with reference to the vessel which is the subject of the contract.

This is so far the natural and indeed elementary view to be taken in the construction of a contract that it would be utterly unnecessary to suggest it were it not for the fact that the claimants' argument disregards and in fact denies it and their position is supported by the Court of Appeals.

The claimants stated in their brief in the Court below (p. 6):

> "We may concede that they [claimants] could not require her to attempt to reach a dock in an unusual location, or one which vessels of her class could not ordinarily reach with safety."

But they claimed that the Arbuckle dock was a customary place of discharge for "vessels of like size and like cargoes, having the usual attributes which strangers to a vessel may assume she possesses, or are charged with knowing that she possesses" (p. 8 *of same brief*), and that in consequence the ship could not properly refuse to go there.

The Court of Appeals said (p. 90):

> "The Arbuckle dock was a safe one where she could be always afloat, and a customary place for the discharge of sugar,"

and that the vessel was bound to deliver there or pay damages for her refusal.

It is submitted that this reasoning is altogether erroneous.

Charter-parties are contracts between the ship-owner and the charterer having in view particular circumstances and certain specified vessels. In contracting for the use of a named vessel the charterer has in view that vessel and not some other vessel. But for the decision in question here it would seem almost a work of supererogation to state that where the owners chartered their vessel they contracted with reference to that vessel. They were not concerned with and doubtless did not consider the possible or probable capabilities, with respect to various ports in the world, of a wholly supposititious and indeterminate class of vessels that might be regarded as having one or many features in common with the ship that was the subject of the contract.

They made a contract for their ship, the Benlarig, and the terms of the contract require that the place designated for her discharge must be a safe one *for her*, and one where she may discharge always afloat (*Atkins* v. *Fibre Disintegrating Co.*, 2 Ben. 381, 385; 2 Fed. Cas; 78, 79).

The Arbuckle dock was not a safe place of discharge for the Benlarig, for she could not reach it in safety, nor could she safely leave it. She would have had to lose about ten feet of her steel masts in order to proceed loaded under the Bridge. On her return after discharging her cargo, at least

ten feet more would have had to be cut from the masts, unless a return cargo could have been secured above the Bridge.

The District Court said in this connection (p. 84):

"It is thought that it is the privilege of the ship to be preserved from self-mutilation and that she need not be crippled, deformed, or dismantled, for the purpose of delivering her cargo. Apparently that should never be required. It should not be expected."

To hold to the contrary as the Court of Appeals did would seem almost unreasonable.

The claimants contend that the phrase "to deliver the same always afloat" means simply that there shall be sufficient water at the dock for the ship to lie afloat, and for her to float up to the dock, irrespective of obstructions under water or in the air. So far as the vessel and her safety are concerned it would seem to make no difference in what direction the danger lay.

The Brooklyn Bridge would be no more unsafe for her if it was but 35 instead of 135 feet high. Nor would the Arbuckle dock have been less accessible to her if there had been a bar at a considerable distance from it, causing too shallow water for the vessel, as in *The Gazelle*, 128 U. S., 474, referred to above.

Or let it be supposed that the Brooklyn Bridge was a drawbridge and not more than 25 or 35 feet above the water instead of 135. If the width of the draw was sufficient to enable the large

majority of all the vessels in the world to pass, but yet it was too narrow by only a few inches for the Benlarig, can it be supposed that she would be required to shave a few inches off her side planking to enable her to get through or else pay the cost of lightering the cargo?

Or if there was a drawbridge through which in ordinary course any ship might pass, but the draw was not in working order and could not be opened at the time the dock was designated to the vessel, must the ship bear such risk, and if she cannot reach the designated dock, though by no fault of her own, must she pay the expense of lightering the cargo though she is ready to discharge directly at any dock she can safely reach?

As the District Judge suggests (p. 83):

"The ship could not be ordered to a slip which was too narrow to receive her or where there was some overhanging shed or house that would prevent. So if the entrance to the dock were obstructed, or there was other interference with the discharge at the place designated."

But under this "class" decision of the Court of Appeals, if there was such overhanging shed, and it was high enough to clear the masts of almost all vessels, but not sufficiently high to allow the Benlarig to lie at her dock, the ship must cut her masts, or pay to have her cargo lightered.

Or, again, if there was a bar in front of the dock, but yet sufficient water for almost all vessels to pass, but not enough for the Benlarig, must the ship then lighter at her own expense so much cargo as may be necessary to enable her safely to

reach the designated place of discharge? The claimants would not so contend.

Indeed in their brief in the Court below (p. 12) the claimants admit that the ship would be excused if she should be ordered to a place "which by reason of some permanent physical obstacle, was inaccessible both to the Benlarig and to vessels of her size and class." But the claimants had no contract with respect to any class of vessels, but only with the Benlarig.

The effect of an obstruction other than one under water was considered in *Williams* v. *Theobald*, 15 Fed., 465. The charter there provided that the cargo was to be "delivered alongside any * * * wharf or pier as may be directed by the consignees." The consignees named a wharf that owing to its crowded condition was inaccessible to the vessel for a longer time than that provided by the charter.

The question was one of demurrage, for which the consignee was held liable, but in discussing the general subject, Hoffman, *J.*, said (p. 467):

> "It appears to be well settled in England that where by a charter-party a ship is to be brought to a particular dock, or as near thereto as she may safely get, and she is prevented from getting to her primary destination *by any permanent obstacle* other than an accident of navigation, the shipowner is entitled to damages for the detention by reason of the charterers' refusal to receive the cargo at the alternative place of delivery, although the obstacle which prevented her from getting into the docks (viz., their crowded state), was not an obstacle endangering her safety."

A case singularly like the present one in its circumstances came before the Divisional Court in England, after the date of trial of this case.

The case is *Re An Arbitration between Goodbody & Co. and Balfour, Williamson & Co.*, 8 Asp. Mar. Law Cas., 503. The case is also reported in 4 Com. Cas., 119. The decision was affirmed by the Court of Appeal in 5 Com. Cas., 59.

This case is referred to at length by the District Judge (p. 84) who found the facts in the two cases to be equal (p. 85). The Court of Appeals disregarded the case on the statement that the facts were different. It may, therefore, be advisable to refer to the case in detail.

The facts were that a cargo of wheat per the ship Vanduara, had been sold by Balfour, Williamson & Co. to Goodbody & Co.

The contract contained the clause: "Shipped * * * per Vanduara * * * sailed, or about to sail, as per bill or bills of lading dated or to be dated accordingly * * * *to any safe port* in the United Kingdom of Great Britain and Ireland, or to Havre or to Dunkirk or to Antwerp, calling at Queenstown, Falmouth or Plymouth, for orders as per charter-party, vessel to discharge afloat."

When the documents for the cargo were received it was found that by the terms of the bills of lading the cargo was stated to have been shipped upon the Vanduara "to discharge at a safe port in the United Kingdom, Manchester excepted." The vendees declined to take up the documents on the ground that they did not comply with the contract for delivery in any safe port in the United Kingdom.

It was found in the special case stated for the decision of the Court that—

"the *Vanduara* when loaded with the said cargo would have been unable to go up the Manchester Ship Canal to the Manchester Docks, *because the heads of her lower main and mizzen masts would have been higher than the limit fixed by the Canal Company's regulations for passing under the Runcorn Bridge*" (p. 504).

The vendors contended that the addition to the bills of lading of the words "Manchester excepted" was immaterial, inasmuch as Manchester, in any event, was not a "safe port" in the sense of the bills of lading, as the ship could not reach it without cutting off or taking down her mast. The Court so held, and determined that the tender of the documents containing the clause "Manchester excepted" was a good tender under the contract. Bruce, *J.* (p. 506), said:

"It is found as a fact that the *Vanduara* when loaded with the said cargo would have been unable to go up the Manchester Ship Canal because the heads of her lower main and mizzen masts would have been higher than the limit fixed by the canal company's regulations for passing under Runcorn Bridge. It would be necessary to dismantle the ship to enable her to get under Runcorn Bridge. Runcorn Bridge is about twenty-four miles from Manchester, and about twelve miles from the entrance of the canal. Runcorn Lay-bye consists of an embayment which was made by the Manchester Ship Canal Company in their canal between the town of Runcorn and the old river bed, and affords capabilities for a vessel up to 5,000 tons to discharge cargo there. It was contended on behalf of the sellers that Manchester was not a safe port for the

Vanduara, because the height of her masts prevented her getting to Manchester, and that therefore the words in the charter-party and the bill of lading 'Manchester excepted,' did not amount to a variance from the terms of the contract, because, as Manchester was not a safe port for the ship, she could not in any case have been ordered there."

The learned Judge further added (p. 507):

"If the words 'Manchester excepted' have acquired this meaning (that Manchester and the waters adjacent thereto are alone excepted), *Manchester was not a safe port for the Vanduara. She could not have been ordered to Manchester in any case, because she could not have got under Runcorn Bridge*, and the presentation of documents containing the words 'Manchester excepted' imposed no restriction upon the purchaser inconsistent with the terms of the contract of purchase. * * * I may observe that the contract was for a cargo per *Vanduara*, a named ship, and, if in point of fact Manchester was not a safe port for her, it does not seem to me that the defendants were in any way prejudiced by a phrase being introduced into the documents which abridged none of their rights, and imposed no restriction which was not imposed by the terms of the contract itself."

On appeal the judgment of the Divisional Court was affirmed (5 Com. Cas., 59). A. L. Smith, *L.J.*, said (p. 66):

"It is abundantly proved that Manchester, taken by itself, was not a safe port for this vessel, because it was found as a fact * * * that it would have been necessary to dismantle the ship to enable her to to get under Runcorn Bridge, which is the first bridge vessels going up the canal to Manchester have to pass." And at page 67:

"On the findings of fact in this case I am

clearly of opinion that it was quite immaterial whether the words 'Manchester excepted, were or were not in the shipping documents."

Collins, *L. J.*, said (p. 67):

"If Manchester was not a safe port, the addition of the words 'Manchester excepted' did not alter the contract. It is, therefore, necessary to ascertain whether Manchester was or was not a safe port, and it seems to me that no difficulty arises on that question when once the boundaries of the port of Manchester have been ascertained."

Vaughan Williams, *L. J.*, said (p. 69):

"On the findings of the last award it is perfectly plain that in a commercial sense, the port of Manchester in that sense was not a safe port for the *Vanduara* to go to."

It is to be noted that the Vanduara would no more have had to be dismantled to pass under the Runcorn Bridge than would the Benlarig to pass under the Brooklyn Bridge.

In both cases the vessel's masts would have had to be cut. This circumstance was sufficient in the English case to keep Manchester out of the class of safe ports for the Vanduara, though Runcorn Laybye below the bridge was part of the port of Manchester and could accommodate vessels not exceeding 5,000 tons.

The case in effect decides that an obstruction in the air which bars access to the place designated for the discharge, quite as effectively prevents it from being safe for the ship as if the obstruction were a sand bar or any other obstacle below the water.

Full force and effect may be given to the contract by limiting the scope of the words to the construction above outlined. In the port of New York there are half a dozen miles of piers perfectly suitable for the discharge of Java sugar. The shipowner did not know, at the time the charter was made, that the sugar was to be delivered in the port of New York, much less at a particular place in the port above the Brooklyn Bridge. The charter-party and the cargo had passed through several hands before their ownership vested in the claimants, Arbuckle Bros. If Czarnikow, Macdougall & Co., who apparently owned the cargo when the ship came into port (p. 22) had not found an immediate market for it at one of the refineries, it would in the ordinary course have been stored in some of the warehouses below the Bridge. Under all these circumstances, therefore, it is most unreasonable to suppose that the parties to the contract ever contemplated that they were binding the ship to discharge at a place in the port of New York which she could not reach on account of permanent obstacles.

One other contention of the claimants should here be referred to and that is that by custom in this port under the clause just considered, the ship was bound to deliver her cargo at the designated place, even though the vessel's masts could not be lowered so as to pass under the bridge.

The District Court found (p. 82), that :

"It is quite exceptional for a ship to have immovable masts so high that she cannot pass under the bridge, and there is no custom or practice known among shipping merchants respecting such a case."

The Court of Appeals concurred in this finding (p. 89):

"There is no custom in the port of New York respecting the course to be pursued by vessels directed to discharge above the Bridge, which have immovable masts too high to permit a passage beneath the Bridge."

In view of this concurrent finding the contention with regard to custom will probably not be pressed in this Court.

SECOND POINT.

UNDER THE LIGHTERAGE CLAUSE THE RECEIVERS OF THE CARGO MUST BEAR THE EXPENSE OF LIGHTERING THE CARGO TO THE DOCK WHICH THE VESSEL COULD NOT SAFELY REACH.

If there could be properly any doubt on the construction of the previous clause in the charter, it is altogether removed by the form of the lighterage clause 4, and it is submitted that the Court of Appeals committed a grave error in the construction that they put on it.

The lighterage clause in the charter-party was in these words:

"4. All goods to be brought to and *taken from alongside* of the ship, always afloat, *at the said*

charterers' risk and expense, who may direct the same to the most convenient anchorage; *lighterage*, if any, *to reach the port* of destination, *or deliver the cargo at port of destination, remains for account of receivers, any custom of the port to the contrary notwithstanding*" (p. 5),

It is to be noted at the outset that under this clause the goods are to be taken from alongside the ship "at the charterers' risk and expense." This language is clear and unequivocal. Taken in connection with the rest of the charter-party, it is a stipulation by the charterer or consignee that when the vessel has gone so near the place of discharge as she can safely get, the expense of taking the cargo from alongside, however it shall be taken, shall be at the charterers' risk and expense.

It has never been contended by the claimants that the Benlarig could reach safely the place of discharge. As the District Court held (p. 83), "lighterage was necessary for the purpose of delivering this cargo." The expense of this lighterage was one that the consignee stipulated by these words, to pay (*Carr* v. *Austin*, 14 Fed. R., 419; *The Nifa* (1892), Prob. 411).

The claimants have not suggested that the clause does not apply to the situation here presented.

The words are not referred to by the Court of Appeals.

Any possible doubt of the application of the phrase, however, is removed by the language of the balance of the whole clause.

The Court of Appeals say, speaking of this clause as a whole, that it is

"a well known provision, and was introduced into charter-parties originally to provide for the payment of lighterage when the vessel was unable to deliver the cargo at a dock to which she had been assigned from a cause to which vessels generally might be expected to be subject, such as shoal water or a bar" (p. 91).

A lighterage clause in some form may be a well known provision in charter-parties but it is entirely clear from the testimony of the claimants' witnesses that the form of the clause used here is most unusual (*Snow*, p. 56; *Elliott*, pp. 64-65). One of the witnesses claimed to be familiar with the clause, and said that it had been construed by custom to become operative only where there was not sufficient water at the dock to enable the vessel to float. He was unable, however, to give a single instance where that interpretation had been given to the clause (*Mac Dougall*, p. 49).

Still another witness claimed that the clause was in the usual form because he interpreted it as having the same meaning as other words that ordinarily were used instead of those found here (*Smith*, p. 59).

The usual form of the clause apparently is "Lighterage, if any, to be paid by the charterers" (*Snow*, p. 56).

This is also seen by reference to the cases previously cited.

The clause in this charter-party is unusual in

two particulars in that it provides (1) that the receivers are to pay for the lighterage, if any be necessary, *not only to reach* the port of destination *but also to deliver* the cargo at port of destination; and (2) that the lighterage shall be for account of the receivers "any custom of the port to the contrary notwithstanding."

It would seem difficult to imagine a more explict stipulation that the receivers should pay for any necessary lighterage.

As the District Court said (p. 84) with regard to this clause:

> "It is useless to conjecture respecting these stipulations, where they are, as in the present case unambiguous. It is better to take words at their apparent ordinary meaning, and hold parties to their agreement according to the plain sense of the language used. Adopting such rule the libelant should recover."

In face of these explicit provisions, no evidence of a custom for the *ship* to pay lighterage would be admissible (The *Nifa* [1892], Prob., 411; 7 Asp., 324; *Holman* v. *Wade*, London *Times*, May 11, 1877, cited in the *Nifa*, 7 Asp., at p. 325; *Hayton* v. *Irwin*, 5 C. P. D., 130; 4 Asp., 212; *Lishman* v. *Christie*, 6 Asp., 186, 188; 19 Q. B. D., 333, 337).

Both Courts below have found that there was no custom in the port under this clause. If there had been such custom, evidence of it would have been excluded by the language of the clause (*Brenda S. S. Co., Ltd.*, v. *Green* (1900) 1 Q. B., 518, in the Court of Appeal).

The Court of Appeals further found that the owners knew, or had reason to know, of the height of the Benlarig's masts, "but did not insert a provision in the charter that she should not be required to go above the Bridge, but preferred to rely upon Article 4" (p. 91).

This is a distinct finding that the owners thought that the language of the lighterage clause protected their vessel from going above the Bridge, and intended that it should do so. It is wholly irreconcilable with any notion that they could have intended to undertake to deliver above the Bridge. The stipulation itself is perfectly clear and unambiguous, and is an explicit agreement that if any lighterage is necessary, either to reach the port of destination, or deliver the cargo at the port of destination, the cost of such lighterage shall be paid by the receivers, any custom of the port to the contrary notwithstanding.

It must be remembered that the owners did not know when the charter-party was effected that the vessel was going to New York. The charterer might have ordered the vessel to any one of many ports. It may very well be that if any particular port had been contemplated, special provisions would have been put in to that effect; but as this was not the case, the provisions of the charter were made general to protect the ship in any contingencies that might arise. Even after the vessel arrived at the port of New York, there were a half dozen miles of piers on the North River, or on the East River below the Bridge which were perfectly suitable for the discharge of

Java sugar, and where the vessel could have discharged in safety.

Nor is it any hardship whatever on the receivers that they should be held strictly to the terms of the documents which they bought, for the bills of lading expressly included all the conditions and exceptions of the charter-party.

It is alleged by the claimants that the construction contended for by the libelant would lead to the position that the ship could insist on discharging as soon as she reached a place from which lighterage was feasible. But this is not so. If a safe dock for the ship is designated she must go to it, and it is only where such a dock is not selected and lighterage becomes necessary that it has to be incurred.

Nor is there any further warrant for the suggestion that the lighterage clause becomes applicable only where the ship has performed her whole duty under this contract. The determining question in the case is whether the ship has performed all she was bound to do. That question must be considered with reference to the entire contract, of which the lighterage clause is a part.

Whatever the purpose for which a lighterage clause in some form may have been introduced in other charter-parties, the form of it as it occurs here was adopted by the owner to meet the circumstances of his own vessel, and must be regarded as expressing the agreement of the parties at the time it was made.

Although they used language that aptly covered circumstances that might be and actually were en-

countered, the Court of Appeals refused to allow them the benefit of this contract. Their reasoning is stated at page 91:

"The case is that of the claimed application to novel circumstances of a clause intended for a different set of circumstances, and is as if a vessel unable by reason of its novel construction to reach a dock which ninety-nine per cent. of vessels do reach, should desire to place the expenses of lighterage upon the charterers under article 4. Such an attempt would be and *the facts of this case are within the letter of the article, but not within its spirit.*"

There is absolutely no evidence in the case outside the charter-party and bills of lading themselves, to indicate what the owners and the charterers intended by the language used, nor is there any warrant for the finding that the clause was intended for any other circumstances than those embraced by its language.

It is respectfully submitted that the finding of the Court of Appeals is an attempt to change the contract actually made by the shipowner for some other contract more favorable to the receivers of the cargo which the Court thought should have been made, and that it constitutes a most unwarrantable invasion of the shipowner's vested rights.

The distinction between the "letter" and the "spirit" seems to be the result of a visionary departure into a nebulous atmosphere. It is altogether beyond the comprehension of the shipowners, as practical men, and it is difficult to see how in the exercise of reasonable human foresight the difficulties suggested by this distinction could be provided against.

LAST POINT.

THE DECREE OF THE COURT OF APPEALS SHOULD BE REVERSED AND THE CAUSE REMANDED, WITH DIRECTIONS TO AFFIRM THE DECREE OF THE DISTRICT COURT, WITH INTEREST AND COSTS.

The attention of the Court is specifically requested to the question of interest on the amount of the decree awarded to the libelant for the balance of freight withheld.

This decree does not provide in terms that interest shall run from the date of the decree until the date of its satisfaction (p. 86).

If, therefore, this Court shall determine that the libelant was entitled to payment of the balance of freight withheld, in order to avoid any question of the right of the libelant to recover interest under the form of the original decree, or under the decree to be entered pursuant to the mandate of this Court, it is respectfully requested that the mandate shall direct that interest be computed on the amount of the decree from the date of its entry until the decree shall actually be paid.

Dated New York, October 27, 1902.

Respectfully submitted,

CONVERS & KIRLIN,

Proctors for Libelant.

J. PARKER KIRLIN,

CHARLES R. HICKOX,

Of Counsel.

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c/t. 655. Sxt.

Office Supreme Court U.S.
FILED
APR 29 1901
JAMES H. McKENNEY,
Clerk.

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Supreme Court of the United States.

Filed April 29, 1901.

ANTON MENCKE, master of the British ship BENLARIG,
Libellant and Petitioner,

against

A CARGO OF JAVA SUGAR, whereof, ARBUCKLE BROTHERS, are
Claimants, Respondents.

655.

BRIEF FOR RESPONDENTS.

While the *Benlarig* was at sea between Philadelphia and Java, her owners entered into a charter-party of the ship to Erdmann & Sielcken, merchants of Batavia, Samarang, and Sourabaya. The charter-party was made and signed in London July 1, 1898, and was executed on the part of the charterers by an agent.

The engagements of the charter-party, so far as material to the present hearing, were that the *Benlarig* should, after discharging her outward cargo, take on board in Java from the charterers:

> "A full and complete cargo of dry sugars * * * "and being so loaded * * * therewith proceed to "Barbados; thence to proceed to Delaware Break- "water for orders to discharge at New York, Bos- "ton or Philadelphia or Baltimore, or so near the "port of discharge as she may safely get, and de- "liver the same, always afloat, in a customary "place and manner in such dock as directed by "charterers, agreeably to the bills of lading" (*Charter-party, Record, p.* 6; *fols.* 23, 24).

Upon the cargo being shipped in Java, bills of lading were issued reciting that the shipment was made pursuant to all the conditions and exceptions of the charter-party (*Exhibits B, C, D, E, pp.* 12–15).

The respondents, Arbuckle Bros., purchased the cargo thus documented, and became entitled to delivery thereof, according to the provisions of the charter-party and bills of lading (*Gilmour, p.* 105, *fol.* 418).

Upon arrival of the *Benlarig* in New York, Arbuckle Bros. ordered her to discharge at their refinery (*Exhibit* 7, *p.* 31, *fols.* 121, 122).

The designated berth was above the Brooklyn Bridge, and the ship's agent made reply that it would be impossible for the *Benlarig* to pass under the Bridge, because of the vessel having steel masts all in one piece, and that she would be unable, therefore, to house her topmasts in the usual manner and proceed to the dock to which she had been ordered (*Exhibit* 9, *pp.* 32, 33, *fols.* 128, 129).

It was thereupon agreed between the parties that the cargo should be discharged into lighters below the Bridge without prejudice to the rights of the parties under the charter-party (*Exhibit* 12, *p.* 35, *fols.* 138, 140; *Exhibit* 13, *p.* 36, *fols.* 142, 143).

Thereupon the *Benlarig* proceeded to discharge at a pier in the Atlantic Basin (*Exhibit* 14, *p.* 37, *fols.* 145, 146).

Upon discharge of the sugars they were lightered from Atlantic Basin to Arbuckle Bros.' refinery at a cost of $1,466.04 (*Gilmour, pp.* 99, 100, *fols.* 396, 398).

Arbuckle Bros. deducted the cost of lighterage from the freight.

Thereupon this suit was brought by the master of the *Benlarig* claiming the unpaid amount.

The District Judge sustained the libel (*Opinion, pp.* 108–114; *Decree, pp.* 114, 115).

Upon appeal to the United States Circuit Court of Appeals that court reversed the decree of the District Court and directed that the libel be dismissed.

POINTS.

First.

THE DISCHARGING BERTH TO WHICH THE BENLARIG WAS ORDERED WAS SAFE FOR VESSELS OF HER CLASS, AND A PROPER AND USUAL PLACE OF DISCHARGE, AND SHE SHOULD HAVE PROCEEDED THERE OR SHOULD HAVE DELIVERED HER CARGO THERE OTHERWISE AT HER OWN EXPENSE.

The extracts from the charter are usual provisions in Java sugar charters (*Gilmour, p.* 102, *fol.* 408).

The printed forms are used, not only to cover one branch of business, but all branches, and contain, therefore, general provisions adapted to a wide range of ports.

There were certain obligations resting upon the *Benlarig* prior to her arrival at the port of discharge, and certain others resting upon her after arrival at the port of discharge.

The obligations resting upon her prior to her arrival at the port of discharge were to proceed from Delaware Breakwater "to discharge at New York * * * or so near "the port of discharge as she may safely get" (*Charter-party, p.* 6, *fol.* 24).

The words "so near the port of discharge as she may "safely get," would not often be pertinent in connection with such a port of discharge as New York. They would be pertinent in the case of some ports where navigation is subject to interruption by ice, or where shallow bars forbade entrance to other than small craft.

In case of war, New York might become an unsafe port, and then the provision would find application.

In fact, however, the steamer did actually reach the port of New York, and it is material, therefore, to consider only the obligations which rested upon her after her arrival at that port.

Such obligations were to deliver her cargo "always afloat" in a customary place and manner in such dock as

directed by charterers" (*Charter-party, pp.* 6, 7; *fols.* 24, 25).

The sequence of the specified conditions is significant.

First, there is a general provision that the vessel must lie "always afloat."

Next, there is a provision still further restricting the charterers in that the place of discharge must be "a cus- "tomary place," and the manner of discharge, "a cus- "tomary manner."

Finally, within these restrictions, the shipowners agreed to send their vessel to the dock designated by the charterers.

The depth of the water at the place designated by Arbuckle Bros. was ample for the vessel to lie "always afloat" (*Gilmour, p.* 105, *fol.* 420; *Meucke, p.* 43, *fol.* 172), and the "largest vessels go there" (*Smith, p.* 78, *fol.* 312).

Arbuckle Bros. have a large business as refiners. They have acquired property on deep water front, to facilitate delivery of cargoes to them without intermediate drayage or lighterage.

They go into the market and buy full cargoes of sugar, that they may have the right to order vessels to their own refinery to discharge, and thereby save the expense that would otherwise be incurred for lighterage or drayage (*Gilmour, p.* 103, *fol.* 410).

The place to which the *Benlarig* was ordered to discharge was a "customary place." It is indisputed upon the proofs that fully *eighty per cent.* of the sugars arriving in New York is delivered at the large refineries above the Brooklyn Bridge (*Macdougall, p.* 65, *fols.* 258, 259; *Smith, p.* 78, *fol.* 312; *Gilmour, p.* 100, *fol.* 398).

If the charter had specifically stated that the *Benlarig* was to discharge at Havemeyer's Refinery, or at Arbuckle's Refinery, or at any of the other great refineries on the East River above the Bridge, the shipowner could not make an arguable contention that he was relieved from delivering the cargo at the designated dock by reason of his masts being too tall to pass beneath the Bridge.

In view of the character of the cargo, and the naming of the port, and the customary place of discharge of sugars in such port, the charter is to be taken as an engagement by the shipowner to make delivery of the sugars, if required by the cargo owners, above the Bridge.

Second.

THE LIGHTERAGE CLAUSE OF THE CHARTER DOES NOT RELIEVE THE CHARTERERS FROM THE OBLIGATIONS OF PROCEEDING TO OR DELIVERING THE CARGO AT A DESIGNATED DOCK ABOVE THE BRIDGE.

The clause is:

> "4. All goods to be brought to and taken from "alongside the ship always afloat at the said char- "terers' risk and expense, who may direct the same "to the most convenient anchorage; lighterage, if "any, to reach the port of destination, or deliver "the cargo at port of destination, remains for ac- "count of receivers, any custom of the port to the "contrary notwithstanding" (*Charter party, p. 7, fol. 27*).

The shipowner has contended that under this clause the burden of transporting the sugars from the place of actual discharge to the designated dock must fall upon the cargo.

To give the clause this construction sets the other clauses of the charter-party at naught.

The contention, if allowed its full range, would permit the vessel to refuse to proceed further, and to insist upon discharging as soon as she reached a place from which lighterage to the dock desired by charterers was feasible. The fallacy of the argument is made otherwise apparent by considering that where the vessel refuses to proceed to the dock designated, the liability for expense of carrying the cargo thither would be made to depend upon whether

trucks, drays or railways were used to complete the distance or whether lighters were so used.

The lighterage clause has reference, at most, only to cases in which the vessel has already performed her whole duty under the contract. There are many cases where the clause becomes operative and of importance as where portions of the cargo need to be distributed to different destinations within the port away from the dock originally designated; or again, where the vessel is relieved from proceeding to the designated dock because she cannot lie safely "always afloat" at such dock; or again, where she cannot reach the port itself; or again, where the charterers elect to have the vessel discharge at an anchorage; or again, where vessels ordinarily discharge at an anchorage, as in Havana.

The lighterage clause, in substantially the form used in this charter, has had a wide use for many years, and its reach is fully understood by the shipping world. It has no application except to cases where the vessel is excused by other provisions in the charter-party from delivering her cargo at the dock desired by the consignees.

Such is the testimony of all the experts (*MacDougall*, *pp.* 66, 67, *fols.* 264, 265; *Snow*, *p.* 74, *fols.* 294, 295; *p.* 75, *fol.* 297; *p.* 76, *fol.* 302; *Smith*, *p.* 78, *fol.* 311; *p.* 81, *fols.* 322, 323).

The rule is well phrased by one of the witnesses:

> "Q. The question is whether this clause compels
> "the charterers to pay lighterage under all circum-
> "stances where lighterage is necessary? A. I don't
> "see the necessity of the lighterage.
> "By the Court: Q. Supposing there is a necessity
> "for it, who is to pay the lighterage? A. *If the*
> "*ship had performed her duty and after that there*
> "*was a necessity for it the charterer would have*
> "*to pay it* (*Snow*, *pp.* 74, 75, *fols.* 296, 297)."

In this case the ship had not performed her duty because she had not proceeded to the customary place of discharge designated by Arbuckle Bros.

Third.

WHERE DIFFERENT CONSTRUCTIONS OF A CONTRACT ARE POSSIBLE, SUCH CONSTRUCTION SHOULD BE CHOSEN AS MAY FAIRLY BE INFERRED TO HAVE BEEN THE INTENTION OF THE PARTIES VIEWED IN THE LIGHT OF ALL FACTS.

The owners of the *Benlarig* chartered her to carry a cargo of sugars to one of several designated ports, among them, New York.

The usual place to discharge such cargoes in New York is above the Bridge, where fully four-fifths of the sugar is, and for many years has been, discharged.

With perhaps a dozen exceptions, all the vessels in the world are able to pass under the Bridge by simply housing the light upper masts (*Gilmour, p.* 101, *fol.* 403; *Smith, p.* 82, *fol.* 328; *Macdougall, p.* 67, *fol.* 268).

The construction of the *Benlarig's* masts was not only unusual, but the style was novel (*Gilmour, p.* 101, *fol.* 402).

Masts in single pieces of the height carried by the *Benlarig* are so rare as not to charge merchants with any responsibility of investigation.

It is more reasonable to require the shipowner to assert his disabilities and to insert in the charter-party due provision exempting him from sending his vessel above the Bridge (*Smith, p* 78, *fol.* 310; *Brooks, p.* 92, *fol.* 365).

Fourth.

IT IS RESPECTFULLY SUBMITTED THAT THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for Respondents.

WILHELMUS MYNDERSE,
Advocate.

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No. 90.

Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY
Clerk

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Filed Nov. 11, 1902.

Supreme Court of the United States

No. 90
October Term, 1902.

ANTON MENCKE,
Libelant, Petitioner,

vs.

A CARGO OF JAVA SUGAR EX SHIP BENLARIG, WHEREOF ARBUCKLE BROTHERS ARE
Claimants, Respondents.

Brief for Respondents.

WILHELMUS MYNDERSE,
Advocate.

Supreme Court of the United States.

ANTON MENCKE, master of the British ship BENLARIG,
Libelant, Petitioner,

against

A CARGO OF JAVA SUGAR, whereof ARBUCKLE BROS. are
Claimants, Respondents.

October Term, 1902.
No. 91.

BRIEF FOR RESPONDENTS.

This action comes before the Court under a writ of *certiorari* issued to the Judges of the United States Circuit Court of Appeals for the Second Circuit (*Writ of Certiorari, p. 93*).

The action was instituted by the master of the ship *Benlarig*, in the District Court of the United States for the Eastern District of New York, May 26, 1899, claiming balance of freight from a cargo of Java sugar shipped in Java and delivered in New York in the amount of $1,929.52 (*Libel, pp. 1-3*).

After the institution of the suit, the claimants of the sugar paid to the libelant, on account of such freight, the sum of $463.40, thereby reducing the libelant's claim to $1,466.12 (*Ans. to 1st. Int., p. 15*).

The claimants defended against the reduced claim upon averments that the libelant had not made due delivery of the sugar, in that he did not deliver the same at the place ordered by the claimants, thereby involving the claimants in expenses for lighterage in the amount of $1,466.12,

which "loss and damage" they prayed leave to recoup (*Ans., pp. 13-14*).

The District Court entered a decree in favor of the libelant (*Decree, pp. 85, 86*), an opinion being filed by the District Judge (*Opinion, pp. 81-85*).

Upon an appeal taken by the respondents, the United States Circuit Court of Appeals, after a hearing, filed its opinion that the decree of the District Court should be reversed, with costs (*Opinion, pp. 88-91*), and entered an order accordingly, directing that the cause be remanded to the District Court with instructions to dismiss the libel, with costs (*Order, p. 92*).

At that stage of the proceedings the writ of *certiorari* issued from this Court.

Statement of Facts.

The ship *Benlarig* was chartered in London, July 1, 1898, by her owners, Watson Bros., to Erdmann & Sielcken, merchants, of Java (*Charter-Party, pp. 3-7*).

The principal portion of the charter-party was in print It provided that the *Benlarig*, then bound on a voyage for Java, should after discharging the cargo then aboard, load a full cargo of sugar at one or more ports on the north coast of Java, and therewith proceed to Barbadoes, and thence to Queenstown or Falmouth for orders to discharge at a safe port in the United Kingdom, or on the continent of Europe between Havre and Hamburg.

There was an alternative provision that the ship might be ordered from Barbadoes to Delaware Breakwater for orders to discharge at New York, Boston, Philadelphia, or Baltimore.

There was a further provision that certain concessions in the charter hire should be made to the charterers, if the vessel should be ordered direct from Barbadoes to an authorized European or American port of discharge, without being required to proceed to a port of call at Queenstown, Falmouth or Delaware Breakwater.

The *Benlarig* took her cargo under this charter in due course.

Upon arrival at Barbadoes the vessel was ordered to proceed to New York (*Mencke, p. 17*).

Bills of lading had been issued for the cargo, reciting shipment by the charterers, Erdmann & Sielcken, and providing for delivery to Winter & Smillie, or to their assigns upon payment of freight as per charter-party. The bills of lading stipulated for the application of all the conditions and exceptions of the charter party (*Exhs.* 3, 4, 5, 6, *pp. 18–20*).

The *Benlarig* arrived in New York April 14 (*Libel, p. 2*).

In the meantime the claimants, Arbuckle Bros., had purchased the cargo, and were the holders of the bills of lading (*Mencke, p. 22; Gilmour, p. 74*).

On April 15 the ship's agent applied to Arbuckle Bros. for orders to a discharging berth (*Exh. 9, p. 22*).

On the same day Arbuckle Bros. ordered the vessel discharged at their refinery, foot of Pearl street, Brooklyn (*Exh. 7, p. 21*).

The designated berth was above the Brooklyn Bridge, and the ship's agent made reply that it would be impossible for the *Benlarig* to pass beneath the bridge, because of the vessel having steel masts all in one piece, and that she would be unable, therefore, to proceed to the dock to which she had been ordered. He applied for further orders for discharging berth (*Exh. 11, pp. 23-24*).

It was thereupon agreed between the parties that the cargo should be discharged into lighters below the Bridge without prejudice to the rights of the parties under the charter party (*Exhs. 12, 13, pp. 24-25; Ans. to 2d Int.; Amendment to Libel, p. 12*).

Thereupon Arbuckle Bros. designated a pier in Atlantic Basin for such discharge of the sugar (*Exh. 14, p. 25*).

Upon discharge of the sugars they were lightered from Atlantic Basin to the claimants' refinery, Pearl street, Brooklyn, at a cost of $1,466.12 (*Gilmour, pp. 75–76*).

The libelant has conceded that the cost was reasonable in amount (*Gilmour, p. 76*).

The *Benlarig* was of medium size, measuring 1,692 tons. Her masts were of steel. There was a peculiarity in their

construction, in that, instead of being built in three or more sections, such as foremast, foretopmast, foretopgallant mast, foreroyal mast, foreskysail mast, each section being stepped on the other, they were built in a uniform construction of cylindrical plates riveted together, covering internal angle iron braces (*Mencke, pp. 28, 32, 35*). The height of the mainmast was about 145 feet above the water line, and the foremast was within a few inches of the same height (*Mencke, p. 27; Bentz, p. 35*).

The central span of the Brooklyn Bridge was 135 feet above mean high water (*Martin, p. 45*), and the clearance was only 140 feet above low water (*Spaulding, p. 38*).

In order to pass beneath the Bridge at low water it would, therefore, be necessary for the *Benlarig* to remove about five feet of her foremast and her mainmast. Unless by such removal of that much of her masts, she could not reach the designated dock at the claimant's refinery, except by going through Long Island Sound and through Hell Gate.

The question in the case is whether the *Benlarig* was bound to make delivery of the sugar at the claimants' refinery, either by cutting her masts, or by going through Long Island Sound, or by employing lighters.

The portions of the charter-party which have been deemed material to the dispute are as follows:

> "To discharge always afloat, either at a safe port
> " in the United Kingdom or on the continent of
> " Europe between Havre and Hamburg, both in-
> " cluded, Rouen excluded, or at option of charter-
> " ers to order vessel from Barbadoes to proceed to
> " Delaware Breakwater for orders to discharge at
> " New York, or Boston, or Philadelphia, or Balti-
> " more, or so near the port of discharge as she
> " may safely get, and deliver the same, always
> " afloat, in a customary place and manner, in such
> " dock as directed by charterers" (*Charter-Party Art. 1, p. 4*).
>
> "All goods to be brought to and taken from
> " alongside of the ship always afloat at the said
> " charterers' risk and expense, who may direct the
> " same to the most convenient anchorage; lighter-
> " age, if any, to reach the port of destination or

"deliver the cargo at port of destination, remains "for account of receivers, any custom of the port "to the contrary notwithstanding" (*Charter-Party, Art. 4, p. 5*).

These extracts appear in the regular printed form of the charter-party, except that in Article 1 the names of the specified ports were in writing, and in Article 4 the words "always afloat" were in writing.

The undisputed proofs show that fully eighty per cent. of the sugar coming to the port of New York during recent years has been discharged above the Brooklyn Bridge (*MacDougall, p. 48; Smith, p. 58; Gilmour, p. 75*).

The undisputed proofs further show that it has been the custom for vessels, whose masts in ordinary state do not permit them to go under the Bridge, to house the top-gallant masts and then to proceed above the Bridge (*Smith, p. 61; Elliott, p. 63; Brooks, p. 67*). In exceptional cases where a vessel has carried a mast in a single piece too tall to pass beneath the Bridge there have been at least three instances where the vessel has cut the mast (*Elliott, pp. 63, 64; Brooks, pp. 68, 69.*

The number of vessels so constructed is extremely small, probably not more than a dozen in the entire world (*MacDougall, p. 49; Gilmour, p. 76*).

Vessels with extraordinary masts or vessels that are not willing to incur the expense and trouble of housing the upper masts ordinarily make provision in their charters that they shall not be required to go above the Bridge (*Smith, p. 58; Brooks, p. 67*).

The owners of the *Benlarig* seem to have known at the time they effected the charter to Erdmann & Sielcken that the *Benlarig* could not pass beneath the Bridge (*Rossen, pp. 80, 81*).

POINTS.

First.

THE DISCHARGING BERTH TO WHICH THE BENLARIG WAS ORDERED WAS SAFE FOR VESSELS OF HER CLASS, AND A CUSTOMARY PLACE OF DISCHARGE; AND SHE SHOULD HAVE PROCEEDED THERE, OR SHOULD HAVE DELIVERED HER CARGO THERE OTHERWISE AT HER OWN EXPENSE.

The extracts from the charter are usual provisions in Java Sugar charters (*Gilmour, p. 77*).

The printed forms are used, not only to cover one branch of business, but all branches, and contain, therefore, general provisions adapted to a wide range of ports.

There were certain obligations resting upon the *Benlarig* prior to her arrival at the port of discharge, and certain others resting upon her after arrival at the port of discharge.

The obligations resting upon her prior to her arrival at the port of discharge were to proceed from the port of call at Barbadoes "to discharge at New York * * * or "so near the port of discharge as she may safely get" (*Charter-party, Art. 1, p. 4*).

The words "so near the port of discharge as she may "safely get" (*Charter-party, p. 4*) would not often be restrictive in connection with such a port of discharge as New York, Boston, Philadelphia or Baltimore. They would frequently be pertinent in the case of some ports, where navigation is subject to interruption by ice or where shallow bars forbid entrance to other than small craft.

In case of war New York might become an unsafe port, and then the provision would find application.

In fact, however, the steamer did actually reach the port of New York, and it is material, therefore, to consider only the obligations which rested upon her after her arrival at that port.

Such obligations were defined in the provision that the ship, upon arriving in port, should deliver her cargo

" always afloat in a customary place and manner, " in such dock as directed by charterers" (*Charter "party, fol. 1, p. 4*).

The sequence of the three specified conditions is significant.

First, there is a general provision that the vessel must lie "always afloat."

Next, there is a provision still further restricting the charterers in providing that the place of discharge must be a customary place, and the manner of discharge a customary manner.

Finally, within these restrictions the shipowners agreed to send their vessel to the dock designated by the charterers.

The charter was made specifically for the transportation of sugar, and New York was designated as one of the ports to which the vessel might be sent.

The proofs are that it is customary for eighty per cent. of the sugar arriving in New York to be delivered above the Brooklyn Bridge (*MacDougall, p. 48; Smith, p. 58; Gilmore, p. 75*).

The depth of the water at the place designated by Arbuckle Bros. was ample for the vessel to lie "always afloat" (*Gilmour, p. 79; Mencke, p. 31*), and the "largest vessels go there" (*Smith, p. 58*).

If the charter had specifically stated that discharge was to be made at Havemeyer's refinery or Arbuckle's refinery or at any other of the great refineries on the East River, above the Bridge, the shipowner could not make an arguable contention that he was relieved from delivering the cargo at the designated dock by reason of his masts being too tall to pass beneath the Bridge.

In view of the character of the cargo, the naming of the port, the customary place of discharge of sugars in such port, the charter is to be taken as an engagement by the shipowner to make delivery of the sugar, if so called upon, above the Bridge.

Where a man undertakes by contract to do a particular act, the impossibility of performing the act is no defense

to a suit for breach of contract, unless performance be made impossible in some manner not reasonably to have been foreseen, by an act of God or some fortuitous occurrence.

Nor is a person failing to perform an impossible condition precedent entitled to sue upon a contract, although in the contingency referred to he may sometimes be granted a *quantum meruit* in an action of *quasi* contract.

Paradine v. *Jane, Aleyn 27.*
Jacobs v. *Credit Lyonnais, L. R., 12 Q. B. Div., 589, 603.*
Cutter v. *Powell, 6 L. T., 320.*
Hopper v. *Burness, L. R., 1 C. P., 137.*

Under what principle, therefore, can the *Benlarig* be relieved from her obligation to proceed to the dock designated, or in default thereof pay the cost of delivering her cargo at such dock?

The contracting parties provided that if the vessel could not reach her "port of discharge" she should proceed as near thereto as she might safely get. They did not make any similar or kindred provision in respect of *the place of discharge* within the port; although such provision might have been made, as in the case of the *Euxine*, where it was provided that the vessel should proceed to London Surrey Commercial Docks, "or so near thereunto "as she may safely get," &c.

Dahl v. *Nelson, L. R., 6 App. Cases, 38.*

The only restrictions which the shipowners sought in respect of the place of discharge were that the vessel should be "always afloat," and that it should be a "customary place."

By the words "customary place" was meant a place usual for vessels of like size and like cargoes, having the usual attributes which strangers to a vessel may assume she possesses, or are charged with knowing that she possesses.

Devato v. *823 Barrels of Plumbago, 20 Fed. Rep., 510.*
The Port Adelaide, 38 Fed. Rep., 753.

The Mascotte, 48 Fed. Rep., 119; 51 Fed. Rep., 606.
The Boston, 1 Lowell, 464; Fed. Case No. 1671.

If the learned District Judge intended to hold (*Opinion, p. 83*), that the libelant's obligation to deliver the cargo "in a customary place and manner" applied only after a designated dock had been reached, he was in error, and assignment of error was accordingly lodged. It may be doubted whether he intended so to hold, although his words are susceptible of such construction. But they may also be construed differently.

We do not contend that shipowners would be bound to the specific performance of a contract that would be ruinous to them if literally performed, but we do contend that if they make a contract and do not perform it, either because they cannot conveniently perform it, or because they cannot, from the nature of things, and without the intervention of any excusing casualty, possibly perform it, they must make good the resulting damages.

Fortunately in this case there was an easy alternative to specific performance open to the shipowner (in case the vessel did not wish to cut her masts) by incurring the cost of delivering by other means the cargo at the required place of delivery.

The libelant rested his case upon his own deposition, showing the height and construction of the *Benlarig's* masts, upon the testimony of the Bridge superintendent showing the height of the Bridge, and upon the testimony of the Government surveyor, showing the rise and fall of the tide.

The claimants on their part summoned merchants and ship agents, who have given their construction of clause 1 of the charter.

Mr. MacDougall testified that the provision is a usual one (*MacDougall, p. 46*), and that under the construction given by custom,

" ships lower the topgallant mast so as to be able " to go under the Bridge " (*MacDougall, p. 47*).

Mr. Snow, for forty-two years in the shipping business in New York, recognized the provisions of the charter as usual (*Snow, p. 52*), and said:

" I consider the custom is established for the ves- " sel to go above the Bridge.
" Q. Do you know how serious a thing it is for a " vessel to cut her masts where they are all in one " piece? A. I only recollect of one ship consigned " to us, the masts of which being too high, was thus " cut, and my impression is that the actual cost of " it might have been thirty to forty dollars " (*Snow, p. 52*).

Again, he said that the cutting of the masts was not a serious matter at all (*Snow, p. 53*).

Mr. Smith, of Smith & Shipper, showed familiarity with the form of charter (*Smith, p. 57*), and testified:

" I have always considered the custom in New " York was for the vessel to discharge anywhere in " the port of New York where she can safely lie " afloat, either above or below the Bridge, unless " stipulated especially in the charter that the ves- " sel was not to go above the Bridge " (*Smith, p. 58*).

Mr. Elliot, of the house of Livermore & Company, speaking from an experience of twenty years, after identifying the form of charter "as usual" (*Elliot, p. 62*), testified:

" The custom is, the charterer has a right to " order the ship to a safe dock to discharge the " cargo.
" Q. And it she can't get there? A. I never had " that question come up – if she can't get there.
" Q. Have you had experience with vessels whose " masts were too tall to go under the Bridge? A. " As they stood, yes.
" Q. What has that experience been? A. Some " of them I have had to strike the topgallant mast, " and some I have had to cut the jigger-mast.

"Q. You have represented the vessels in those "cases? A. I have" (*Elliot, p. 63*).

And then again:

"The topgallant masts were housed.
"Q. Has that happened more than once, you have "cut the jigger-mast? A. I have had that hap-"pen to me, I think, three times; but I don't recall "just now more than one vessel where I had to do "it" (*Elliot, p. 63*).

To the same effect is the testimony of other witnesses (*Brooks, pp 67, 68; Gilmour, p. 77*).

Not only is it customary to discharge sugars above the Bridge, but the particular dock designated by Arbuckle Bros. was in every way a proper and usual dock.

"Q. Do you know the dock adjacent to Ar-"buckle's refinery? A. Do I know it? Yes; I have "been there."
"Q. What do you say as to whether it is a rea-"sonable and customary place to discharge sugar? "A. It is a reasonable and customary place to dis-"charge sugar" (*MacDougall, p. 48*).

"Q. What is the condition of water at Arbuckles' "refinery? A. The largest vessels go there
"Q. Can you say whether it is a usual and cus-"tomary place to discharge sugar? A. Yes" (*Smith, p. 58*).

"Q. How much water is there at your refinery? "A. Twenty-five feet at low water" (*Gilmour, p. 79*).

The extreme draft of the *Benlarig* was 21 feet 3 inches (*Mencke, p. 31*).

The expense of cutting the masts and the resulting injury to a vessel carrying masts of ordinary construction, if any, would be trifling, about thirty to forty dollars (*Snow, p. 52*). The mast could be repaired and restored to its former height at a total expense which probably would not exceed one-tenth of the cost of lighterage.

The cutting of the masts under such circumstances, for vessels unable otherwise to pass under the Bridge, not being an unreasonable or uncommon occurrence, cannot, therefore, be said to be outside of the reasonable intendment of the contract.

The District Judge gave undue consideration to a recent English case, *Re an Arbitration between Goodbody & Company and Balfour, Williamson & Company, 8 Asp. Mar. Law Cases, 503; 9 Asp. Mar. Law Cases, 69.*

In that case a cargo had been sold for delivery at "any safe port in the United Kingdom." The sellers, in performance of their contract, tendered bills of lading of the *Vanduara*, covering a cargo destined to "any safe port in the United Kingdom, Manchester excepted." The buyers refused to accept the documents. Thereupon the sellers, by arrangement with the shipowners, procured the erasure of the words, "Manchester excepted," and tendered the documents again. The buyers again refused them on the ground that the documents had been altered.

The Court held that the words, "Manchester excepted," in the bills of lading, imposed no restriction upon the purchaser inconsistent with the terms of the contract of purchase. Manchester was held to be not a safe port for the *Vanduara*, because of her inability to pass under the Runcorn Bridge, spanning the Manchester Ship Canal, unless she should be "wholly dismasted" (*p. 508*).

The respondents find no fault with the decision in the *Vanduara* case, but it has little or no bearing here. In the first place, Manchester had become a port at all only by the construction of a canal. The *Vanduara* was a ship of the usual type of construction, having her masts in sections. All of her royal masts, topgallant masts and topmasts might have been housed and yet she could not have reached Manchester because the Runcorn Bridge was too low to permit the lowest sections of her masts to pass. There was no showing that vessels of the size and class of the *Vanduara* ever entered Manchester, or that vessels engaged in the trade in which she was engaged ever delivered cargo there. There was a showing that she would require to be practically dismantled in order to reach Man-

chester--"wholly dismasted"; thirdly, the contract condition was specific in its provision for a "safe port."

The Circuit Court of Appeals properly distinguished the case (*Opinion, p. 90*).

The counsel for the libelant have in much detail reviewed cases arising under charter-parties involving the selection of a port of discharge.

It is scarcely profitable to try out each of those cases upon briefs.

Every such case has depended upon the particular engagement of the charter and upon the facts, and in none of the cases has the language been similar to the engagements between the libelant and the respondents respecting the use of the *Benlarig*.

When a Court holds that under an engagement for "a safe port" a vessel is not bound to lie in an open roadstead and discharge her cargo into lighters to send it over a bar which she cannot pass, the decision of the Court is not pertinent to the present case.

The Alhambra (1881), 6 P. D., p. 68.

Nor is it pertinent to the present discussion to show that a Court, in another case, has held that a vessel which had engaged to proceed to a "safe port" and to discharge her cargo "all at one port" is not bound to discharge part of her cargo at Sharpness, and then upon lighter draft proceed to Gloucester to complete her discharge, Gloucester and Sharpness being commercially distinct ports.

Reynolds vs. *Tomlinson* (1896), 1 Q. B., 586.

In another case, mentioned by libelant's counsel, the Court held, and apparently with good reason, though the conclusion does not seem to bear upon the present case, that when a vessel engages to go to "a safe port" and take on a cargo, she is not bound to take on such cargo in the port that she cannot cross the bar and get out of the port although she could safely lie afloat within the port.

Shield vs. *Wilkins*, 5 Wellsby (H. & G.), Ex., 304.

In another case the engagement was that the cargo should be brought to and taken from alongside the ship at merchant's expense "where she could lie always afloat and safe." There was not sufficient water at the quay designated by the charterers for her to lie alongside, and she was compelled to moor herself fifteen feet away and build a staging to the quay. Upon the terms of the engagement and the facts, there would seem to be no question that the decision of the Court imposing the cost of this method of discharge upon the charterers was correct, but it is difficult to see the application to the present case.

The Nifa (1892), Prob. Div., 411.

The libelant's counsel cites also a case where the charter-party provided for discharge at "a safe direct Nor-"wegian or Danish port" and the Court sustained the master's refusal to proceed under such a charter to Aalborg, the draft of his vessel being sixteen feet and Aalborg being seventeen miles up a river, which had at its mouth a bar carrying only ten or eleven feet. The anchorage outside the river was not safe. The conclusion seems sound, but it does not bear upon the *Benlarig's* case.

The Gazelle, 128 U. S., 174.

In another case, cited by the libelant's counsel, the vessel was bound to proceed to "a safe port between Havre "and Hamburg, both ports included * * * or so near "thereunto as she can safely get."

The vessel could not, as loaded, reach Hamburg until certain of her cargo had been lightered. She went as near to Hamburg as she could "safely get" and the expense of lightering from that place to Hamburg was quite properly put upon the charterer under his engagement to take cargo from alongside at his "risk and expense."

Hayden vs. *Irwin*, 3 Aspinall N. S., p. 212.

In the remaining case cited by the libelant the point involved was whether the charterer must pay demurrage to a vessel while she was waiting beyond her lay-days to

secure the use of the wharf designated by him for discharge, the wharf at the time being occupied by other vessels. The decision was that the charterer must pay demurrage, but we do not appreciate the bearing of the decision upon the present case.

Williams vs. *Theobald*, 15 Fed. Rep., 465.

In the case now under argument the *Benlarig* had reached her safe port, the port designated by the contract. She was ordered to a dock therein that was customary, and where she could lie "always afloat."

If the *Benlarig* had been ordered to discharge in an artificial interior basin which was not a usual place for vessels in the Java sugar trade to discharge, or which, by reason of some permanent physical feature, was inaccessible both to the *Benlarig* and to vessels of her size and class and trade, the decision in the *Vanduara* case would become applicable.

Second.

THE LIGHTERAGE CLAUSE OF THE CHARTER DOES NOT RELIEVE THE CHARTERERS FROM THEIR OBLIGATIONS TO PROCEED TO A DESIGNATED DOCK ABOVE THE BRIDGE AND THERE TO DELIVER THE CARGO.

It has been contended by the libelant that the burden of transportation from the place of actual discharge to the designated dock must fall upon the charterers, because of the lighterage clause, which reads as follows:

> "4. All goods to be brought to and taken from
> " alongside the ship, always afloat, at the said char-
> " terers' risk and expense, who may direct the same
> " to the most convenient anchorage; lighterage, if
> " any, to reach the port of destination or deliver
> " the cargo at port of destination remains for ac-
> " count of receivers, any custom of the port to the
> " contrary notwithstanding" (*Charter-party, p. 5*).

To give this clause the construction which has been contended for, sets the other clauses of the charter-party at na

Inasmuch as the contention was in a measure accepted by the District Judge, it calls for more serious consideration that the first statement of the proposition would seem to require.

The contention, if allowed its full range, would permit the vessel to refuse to proceed further and to insist upon discharging as soon as she reached a place from which lighterage to the dock desired by charterers was feasible.

The fallacy of the libelant's argument is made otherwise apparent by considering that where the vessel refuses to proceed to the dock designated, the liability for expense of carrying the cargo thither would be made to depend upon whether trucks, drays or railways were used to complete the distance or whether lighters were so used.

Any construction of the lighterage clause, the effect of which is to limit the choice of the charterers in respect of a dock for discharge, *beyond limiting it to a dock where the vessel can lie afloat and situated in a place customary for the delivery of the sugar*, is clearly repugnant to the contract.

The lighterage clause has reference at the most only to cases in which the vessel has already performed her whole contract.

There are many cases where the clause becomes operative and of importance, as where portions of the cargo need to be distributed to different destinations within the port, away from the dock originally designated; or again, where the vessel is relieved from proceeding to the designated dock because she cannot lie safely "always afloat" at such dock; or again, where she cannot reach the port itself; or again, where the charterers elect to have the vessel discharge at an anchorage; or again, where vessels ordinarily discharge at an anchorage, as in Havana.

As though to indicate the proper or contemplated application of the lighterage provisions, the clause gives to the consignee the right to order the vessel to a "convenient

anchorage," and this provision immediately precedes the stipulations respecting lighterages charges.

The lighterage clause, in substantially the form used in this charter, has had a long and wide use in charter-parties for many years (*McDougall, p. 48; Snow, pp. 52, 54; Smith, p. 57; Elliot, pp. 62, 63; Mackay, p. 72; Gilmour, p. 78*), and its reach is fully understood by the shipping world. It has no application, except to cases where the vessel is excused by other provisions in the charter-party from delivering her cargo at the dock desired by the consignees.

The libelant, in support of his contention, relies solely upon the argument of counsel. No witnesses have been called by him, to give to the clause the construction for which the libelant has contended, or any construction.

The claimants' witnesses, on the other hand, show in what way, through many years, the clause has been applied by merchants.

Mr. MacDougall says:

> "The custom is that that clause would only be-
> "come operative if there wasn't sufficient depth of
> "water for the vessel to go to the discharging
> "berth.
> "Q. And it has no other application then? A.
> "None" (*MacDougall, p. 49*).

Mr. Snow testified:

> "As I understand that custom requires that ves-
> "sel to go to Arbuckle's refinery and there deliver
> "her cargo of sugar, providing there is sufficient
> "water for her to float into that berth and lie there
> "at all times afloat.
> "Q. That is the way custom would always, as
> "far as you know, construe that clause? A. Yes,
> "sir" (*Snow, p. 55*).

And again, phrasing the rule well, he said:

> "Q. The question is whether this clause compels
> "the charterers to pay lighterage under all circum-
> "stances where lighterage is necessary? A. I don't
> "see the necessity of the lighterage.

" By the Court: Q. Supposing there is a neces-
" sity for it, who is to pay the lighterage? *A. If*
" *the ship had performed her duty and after that*
" *there was a necessity for it the charterer would*
" *have to pay it*" (*Snow, p. 55*).

And again:

" A. If she had performed her full duty and
" there still was lighterage to pay the charterer
" would have to pay it" (*Snow, p. 56*).

In this case the ship had not performed her duty because she had not proceeded to the customary place of discharge designated by Arbuckle Bros.

Mr. Smith testified:

" A. The lighterage clause I consider only refers
" to depth of water.
" Q. I don't want your opinion. Is there a cus-
" tom? A. Yes, sir.
" Q. What is the custom? A. That the vessel,
" if ordered to a dock like Matthiessen & Weeks'
" Refinery, where there is not sufficient water to
" lie afloat, that either sufficient cargo is taken out
" and lightered at the cargo's expense, or all the
" cargo.
" Q. The lighterage clause then applies to that
" kind of case? A. Yes" (*Smith, p. 58*).

And again:

" Q. Where the ship has performed her full duty
" under the charter-party, and notwithstanding
" that fact lighterage must be paid, and the charter-
" party contains a lighterage clause in the form of
" Clause 4, or what you call a similar form, is it
" not for the cargo under the custom of this port to
" pay the lighterage? A. Yes, if there isn't suffi-
" cient water where the vessel is ordered for the
" vessel to lie afloat" (*Smith p. 60*).

To apply the clause to this case.

We admit that if the *Benlarig* performed her full duty under the charter-party in going to the dock at Atlantic

Basin and there discharging her cargo, the lighterage charges must be borne by the charterers. But we contend that she did not perform her duty in making the discharge in the Atlantic Basin.

The *Benlarig* cannot absolve herself from the obligations placed by custom upon vessels of her size and general class and trade, by the plea that some detail of her construction placed her in a class by herself, unbound by custom.

Much stress is laid by libelant's counsel upon the concluding words of the lighterage clause, "any custom of the port to the contrary notwithstanding," and upon the fact that one of respondent's witnesses was not familiar with such modification of the clause.

But those words are of no import in the present case. They belong to cases where lighterage is a natural incident to the delivery of the cargo, or where it is contemplated by the parties or is ordered by the charterers.

It is only through misconception of the nature of respondent's defense that reliance can be placed on the lighterage clause.

That defense is that the libelant was bound by the charter-party to send his ship to respondents' stores, and, failing such performance, to make good to the respondents their damages, which fortunately happen to amount only to the cost of lighterage.

Third.

THIS ACTION HAS NOT BEEN BROUGHT BY THE LIBELANT FOR THE RECOVERY OF LIGHTERAGE CHARGES BUT FOR FREIGHT, AGAINST WHICH THE RESPONDENTS SEEK TO RECOUP THEIR DAMAGES.

The libel is declared to be "in a cause of contract" (*Libel, p. 1*).

It alleges non-payment of the freight stipulated in the charter and bills of lading and claims an unpaid balance of $1,929.52 (*Libel, Art. 7, p. 3*).

After the libel was filed the respondents paid the further sum of $463.40 (*Interrogation, p 15*), thereby reduced the balance of freight to $1,466.12, which equaled the amount of lighterage charges to which the respondents had been subjected (*Answer, Art. 10, p. 14; Gilmour, pp. 75, 76*).

The answer sets up a failure of the libelant to perform the contract of transportation, consequent damage in the cost of lighterage, and prays leave to recoup the amount of such damages against the libelant's demand (*Answer, Art. 8, Art. 10; Prayer, p. 14*).

It is essential to bear in mind the lines of the action.

Fourth.

WHERE DIFFERENT CONSTRUCTIONS OF A CONTRACT ARE POSSIBLE, SUCH CONSTRUCTION SHOULD BE CHOSEN AS MAY FAIRLY BE INFERRED TO HAVE BEEN THE INTENTION OF THE PARTIES, VIEWED IN THE LIGHT OF ALL FACTS.

The owners of the *Benlarig* chartered her to carry a cargo of sugar to any one of the several designated ports, among them, New York.

The usual place to discharge such cargoes in New York is above the Bridge, where fully four-fifths of the sugar is, and for many years has been, discharged. With perhaps a dozen exceptions all the vessels in the world are able to pass under the Bridge, by simply housing the light upper masts (*Gilmour, p. 76; Smith, p. 61; MacDougall, p. 49*).

The construction of the *Benlarig's* masts was not only unusual, but the style was novel (*Gilmour, p. 75*).

The heights of vessels' masts are not given in Lloyd's Register (*Snow, p. 54; Elliot, p. 64; Gilmour, p. 76*); nor is the height of their masts commonly known to the trade (*Eliot, p. 64*).

Arbuckle Bros. have a large business as refiners; they have acquired property on the deep water front to facilitate the delivery of cargoes to them without intermediate drayage or lighterage.

They go into the market and buy full cargoes of sugar that they may have the right to order vessels to their own refineries to discharge, for the purpose of saving expenses that would be incurred for lighterage or drayage when discharged elsewhere (*Gilmour, p. 77*).

They bought the cargo of the *Benlarig* upon the documents, and those documents required the vessel, on arriving at New York, to proceed to any customary place for discharge.

If there is any hardship in the case, well recognized principles of justice require that where one or two innocent parties must suffer it should be he who might the more fairly and reasonably have averted the situation which results in a loss to one of the two.

In the present case both parties must be taken to have known the height of the Bridge. The ship's agents actually, and the owners, therefore, presumably, did know it (*Rossen, pp. 80–81*).

The height of the *Benlarig's* masts was known to one party only. The charterers and the claimants had no reasonable way of ascertaining such height. There were no circumstances to put them upon their inquiry.

Masts of such height in one piece are so rare as not to charge merchants with the responsibility of investigation. It is more reasonable to require the shipowner to assert his disabilities and to insert in the charter-party due provision exempting him from sending his vessel above the Bridge (*Smith, p. 58; Brooks, p. 67*).

As regards the draft of the vessel, the shipowner has been careful in all parts of the charter-party to protect himself. The charterers have thereby been put to the peril of ascertaining the actual draft of the vessel, and of selecting waters accordingly. The shipowner should have provided for himself similar protection in respect of other obstacles than shallow water if he desired protection.

The vendor of an article sold without opportunity of in-

spection, for a known purpose, warrants the article to be reasonably adapted for that purpose.

Jones v. *Just*, *L. R.*, *3 Q. B. Div.*, *196*, *202*.
Dushane v. Benedict, *120 U. S.*, *630*, *636*.

The owner of a sea-going vessel warrants her to be seaworthy by implication, if not specifically.

So, where a shipowner charters his vessel for a designated service, he must be deemed to warrant that the vessel shall not be prevented from performing that service by lack of usual and reasonable features of construction and equipment, for a charter is usually signed, as this one was, while the vessel is on the sea.

If a shipowner charters his vessel for a named port without qualification of any kind, he warrants that her cargo shall not be prevented from reaching that port by reason of the character or construction of the vessel, for his undertaking is to carry the cargo to the designated destination "unless prevented by the dangers of the seas "or other unavoidable casualties."

Hunter v. *Prinsep*, *10 East*, *378*, *394*.

Even where by the charter he reserves the alternative, "or so near thereto as the vessel can safely get," he is not excused by the draft of his vessel or by any other circumstances of her construction from taking the goods to within ordinary lighterage distance of the destination, *i. e.*, within the ambit of the port.

Schilizze v. *Derry*, *4 El. & Black*, *873*.
Metcalf v. *Britannia Iron Works Co.*, *L. R.*, *2 Q. B. Div.*, *423*.
Dahl v. *Nelson*, *L. R.*, *6 App. Cases*, *38*, *50*, *51*.

If he charters his vessel for a particular country without naming the port, the character of his vessel will not excuse him from delivering the cargo in a port where such cargoes are usually and generally delivered.

Smith v. *Davenport*, *34 Maine*, *530*.
Parsons on Shipping, *Vol. I.*, *222*.

Nor will it excuse him where the port is named, but no particular district therein is excepted, from delivering the cargo in the district where such cargoes are usually and customarily discharged.

Port Adelaide, 38 Fed. Rep., 753.
The Mascotte, 48 Fed. Rep., 119; 51 Fed. Rep., 606.

When the privilege has been specifically given to the charterer to designate the dock of discharge it would be illogical to say that his position was less favorable than it would be if he did not hold such specific privilege. He is restricted only in naming docks "in a customary place" (*Charter-party, p. 4; The Boston*, 1 Lowell, *464*), and where the vessel may lie "always afloat."

The District Court created a new contract for the parties when it curtailed the charterer's privilege by holding that the dock must be one not only accessible to vessels having the unusual features of this vessel, but that also it must be accessible by a convenient harbor route.

It would be a lesser modification of the contract to impose upon the shipowner the obligation of going around Long Island Sound and through Hell Gate, which was a feasible route (*Gilmour, pp.* 76, 77), than to compel the claimants to take their sugar at the Atlantic Basin.

Fifth.

THE SHIPOWNERS ARE IN DEFAULT UNDER THE LITERAL REQUIREMENTS OF THE CHARTER-PARTY.

They have not delivered the cargo of the *Benlarig* at the designated destination.

Under the contract they are entitled to nothing.

Hopper v. *Burness, L. R., 1 C. P. Div., 137.*

As to a *quantum meruit* they have already received full compensation. The total freight was $15,929.52, and it has been paid entirely, except the amount of lighterage charges to which the respondents were subjected in remedying the default of the libelant.

Sixth.

WE RESPECTFULLY SUBMIT THAT THE DECREE OF THE UNITED STATES CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED, WITH COSTS, AND THAT THE MANDATE OF THIS COURT SHOULD ISSUE TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK, INSTRUCTING IT TO DISMISS THE LIBEL AND TO MAKE A DECREE IN FAVOR OF THE RESPONDENTS FOR THE COSTS OF ALL COURTS.

WILHELMUS MYNDERSE,
Advocate for Arbuckle Brothers.

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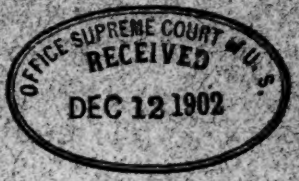

Supreme Court of the United States

No. 90.
October Term, 1902.

ANTON MENCKE,
Libelant, Petitioner,

vs.

A CARGO OF JAVA SUGAR EX SHIP BENLARIG, WHEREOF ARBUCKLE BROTHERS ARE
Claimants, Respondents.

Motion for Rehearing.

WILHELMUS MYNDERSE,
Counsel.

Supreme Court of the United States.

ANTON MENCKE, *Petitioner,* AGAINST A cargo of Java Sugar *ex* ship BENLARIG, James N. Jarvie and others, *Respondents.*	October Term, 1902. No. 90.

Now come the respondents in the above entitled action and pray this Court for a rehearing of this cause, and that the issuance of the mandate of this Court be withheld meantime.

Dated New York, December 15, 1902.

SUPREME COURT OF THE UNITED STATES.

ANTON MENCKE,
Petitioner,

AGAINST

A cargo of Java Sugar *ex* ship BENLARIG, James N. Jarvie and others,
Claimants.

The motion of the claimants for a rehearing is based upon apparent errors of fact in the opinion of the Court.

First.—The opinion construes the charter as though it stipulated absolutely for a "safe port" of discharge and for a "safe" berth in such port.

The charter, however, stipulated for a "safe port" only in the event of the vessel being sent to the United Kingdom, or to the Continent between Havre and Hamburg.

Such a condition was not made respecting New York.

New York was a specifically named port, and the *Benlarig* bound herself to go there, "or as near thereto as she could safely get." She actually entered the port, and thereby all questions as to its approaches were determined.

Having reached the port, she found her further engagements exactly defined by the charter. They were that the vessel should deliver her cargo "always afloat in a "customary place and manner in such dock as directed "by charterers."

That was the whole contract so far as action in the port of New York was concerned.

There was no engagement that the dock thus selected should be a "safe" dock for the *Benlarig*, except in respect of draft of water.

The contract was not casual. It was in a standard form, the ripe fruit of commercial experience, without an idle or careless word.

It stated its meaning exactly.

The cargo was exclusively sugar, and the charter aimed to secure its delivery in the sugar district of the port.

Therefore, the engagement was made for delivery in a "customary place."

That was the dominant purpose of the charter.

Ordinarily a "customary place" would be a safe place, and in fact the berth designated for the *Benlarig* was safe, both in itself and in its approaches, for nearly every vessel in the world.

The largest vessels go there.

Any vessel entering upon such a charter takes the risk that the designated berth, though a customary one, may not be safe for *her*.

If the approaches to the designated place of delivery were not safe for the *Benlarig* because of the extraordinary peculiarities of her construction, that was her risk.

The *letter* of the contract, and the *spirit* of the contract required her to make delivery in a customary place so long as the depth of water should suffice.

We respectfully submit that the ordinary meaning of the language employed warrants no other construction.

Second.—The lighterage clause has been severely applied by the Court.

The clause is subsidiary to the principal engagements of the charter, and relates only to lighterage in ordinary course, to lighterage which is contemplated by the parties.

It does not relate to lighterage incurred solely by reason of the ship's default.

The expenses to which the consignees of the *Benlarig's* sugars were subjected in taking the sugars to their refinery were not within the provisions of the charter relating to lighterage.

Those expenses were purely and simply damages for the ship's breach of a leading engagement of the charter.

The damages chanced to be measured by the cost of lighterage. That might just as well have been measured by the cost of drayage or by tramway charges, and, but for good fortune, they might have been increased by physical injury to the sugars.

Third.—The Court has erred in understanding that "in a few instances" the topmasts of vessels have been taken down to permit them to pass under the bridge.

The housing of the top-gallantmasts of vessels is an every day occurrence and has been a constant recognition by vessels destined to the sugar and oil districts of the port, of the pressure of their contracts.

In a few instances where the vessel carried a jiggermast too tall to go under the Bridge, the jiggermast has been cut, the upper sections of the other masts being housed.

Warrant for this motion seems to be found,

First.—In the serious prejudice to a great section of our most important port by classing it as unsafe, because not accessible to a freakishly designed vessel.

Second.—In the practice and custom of merchants under like charters established through the twenty years that the Brooklyn Bridge has existed.

Third.—Because similar questions can never be brought before this Court except by *certiorari*, and therefore they will practically be determined by the decision herein.

Respectfully submitted,

WILHELMUS MYNDERSE,
Proctor for Respondents.

I certify that I am counsel for the respondents, that I have considered the grounds upon which the motion for a rehearing is based and consider such grounds substantial.

Counsel.

Supreme Court of the United States.

No. 90.—October Term, 1902.

Anton Mencke, Petitioner, vs. A Cargo of Java Sugar, ex-ship "Benlarig;" James N. Jarvie et al., Claimants.	On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 1, 1902.]

This action was begun by the filing on May 27, 1899, of a libel in the United States District Court for the Eastern District of New York, by Anton Mencke, the master of the British ship Benlarig, against a cargo of sugar that had just been delivered from the vessel, to recover an unpaid balance of freight due for conveying the sugar from Java to New York. The receivers of the cargo, the claimants in the action, had deducted from the freight the cost of lightering the cargo from the dock where it had been discharged to the claimants' refinery, which was above the Brooklyn Bridge. The ship had been ordered by the claimants to proceed directly to the refinery, but was unable to do so because the height of her masts was such that she could not pass under the bridge.

The District Court, per Judge Thomas, entered a decree in favor of the libellant January 18, 1900. (99 Fed. Rep. 298.) The claimants appealed to the United States Circuit Court of Appeals for the Second Circuit, and that court on April 16, 1901, reversed the decree of the District Court, and remanded the cause with directions to dismiss the libel. (108 Fed. Rep. 87.)

On May 13, 1901, a writ of certiorari was granted, and the cause was brought to this court. (181 U. S. 620.)

Mr. Justice Shiras delivered the opinion of the Court.

Concerning the facts of the case there is no controversy.

The ship Benlarig was chartered under a charter party dated London, July 1, 1898, between Watson Brothers, her owners, and Erdmann & Sielken, merchants of Batavia.

The vessel duly loaded a full cargo of sugar at Java, and then proceeded to Barbadoes. There she received orders to proceed directly to New York. This she did, arriving on or about April 14, 1899. Before or about the time of the arrival of the Benlarig at the port of New York the cargo of sugar was sold and transferred, with the accompanying bills of lading, by the owners and consignees thereof, to Arbuckle Brothers, sugar refiners.

The agents of the vessel gave notice to Arbuckle Brothers, on April 15, of the arrival of the vessel, and asked for orders for a discharging berth, mentioning that the vessel's mast, being in one piece, would not admit of her going under the Brooklyn Bridge. Arbuckle Brothers ordered the vessel to discharge at their refinery at the foot of Pearl street above the bridge. Subsequently it was agreed that the cargo should be discharged at the West Central Pier, Atlantic Dock, below the bridge, into lighters provided by Arbuckle Brothers, without prejudice to the rights of either party in respect to the payment of the cost of lighterage. This cost amounted to $1,466.12, which was paid by Arbuckle Brothers and deducted by them from the freight; and this suit is to recover the balance of the freight so deducted.

The clear height of the highest span of the Brooklyn Bridge above mean high water is one hundred and thirty-five feet. At dead low water there were not more than one hundred and forty feet in the clear at the highest point.

The Benlarig has three steel masts, built up solid from the bottom to the top, and constructed of cylindrical steel plates, riveted together with internal angle iron braces. There was no way of taking any part of the masts down. The mainmast was one hundred and thirty-nine feet ten inches above the deck; the foremast one hundred and thirty-six feet eight inches above the deck; and the mizzenmast was one hundred and twenty-nine feet above the deck; and the deck was from seven to eight feet above the loadline of the vessel. The ship, therefore, required one hundred and forty-five feet of clear space in order to pass underneath the bridge. This was more than five feet in the clear of the highest point of the bridge when the tide was at the lowest point of the ebb. An additional margin of several feet would have to be allowed for safe passageway; and at the lowest water the Benlarig could not pass under the bridge without cutting off some eight to ten feet of her steel masts.

The charter party provided that the Benlarig should load at Java and should proceed to Barbadoes, "thence to Queenstown or Falmouth, (as directed by charterers or their agents,) for orders to discharge, always afloat, either at a safe port in the United Kingdom or on the continent of Europe between Havre and Hamburg (both included), Rouen excepted, or at option of charterers to order vessel from Bardadoes to proceed to Delaware Breakwater for orders to discharge at New York or Boston or Philadelphia or Baltimore, or so near the port of discharge as she may safely get and deliver the same, always afloat, in a customary place and manner, in such dock, as directed by charterers, agreeably to bills of lading." Section 4 of the charter party further provided that "All goods to be brought to and taken from alongside of the ship, always afloat, at the said charterers' risk and expense, who may direct the same at the most

convenient anchorage; lighterage, if any, to reach the port of destination, or deliver the cargo at port of destination, remains for account of receivers, any custom of the port to the contrary notwithstanding."

Four bills of lading were issued at the ports of loading, reciting the "shipment of the sugar, and containing the identical conditions that the sugar was to be delivered in the like order and condition at the port of discharge as per charter party dated London, 1st July, 1898, (the dangers of the sea excepted,) unto Messrs. Winter & Smillie as agents, or to their assigns, he or they paying freight for the said sugar as per charter party. General average, if any, to be settled according to York-Antwerp rules, 1890. All other conditions and exceptions, negligence and Harter Act clauses included, as per charter party above referred to, with average accustomed."

The positions of the respective parties may be briefly stated thus:

The libellant's contention is that, under clause of the charter party, the right of the charterers or their assigns to select the dock for the discharge of cargo was subject to the limitation that such dock must be one that was safe and suitable for the ship as well as for the cargo, and one to which the ship could proceed without hindrance by permanent obstacles, which she could not pass without being mutilated, crippled or dismantled; and that, under clause 4 of the charter party, any lighterage necessary to deliver the cargo at the port of destination must be paid by the charterers.

The claimants contend that the discharging berth to which the Benlarig was ordered was safe for vessels of her class, and a customary place of discharge; and she should have proceeded there, or should have delivered her cargo there otherwise at her own expense; and that the lighterage clause of the charter party does not relieve the owners of the ship from their obligation to proceed to a designated dock above the bridge, and to there deliver the cargo.

Another suggestion made on behalf of the claimants, namely, that the Benlarig, though unable to pass under the bridge, might have reached the Arbuckle dock by sailing around Long Island, and then through the Sound and Hell Gate to Brooklyn, should be first disposed of. It is, perhaps, sufficient to say that no such allegation appears in the claimants' answer. Nor did the claimants' assignments of error to the judgment of the District Court raise any such question. Neither did the claimants, during the negotiations, make any such suggestion. Moreover, the District Court and the Circuit Court of Appeals agreed in the statement that "all shipping experts called by the claimants testified that they had never heard of a ship from Java pursuing that course, and it may therefore be concluded that such alternative was contrary to the expectations and understanding of all parties to this contract, or of any other contract for the carriage of sugar from Java."

The question that remains is, upon which of the parties the expense of the lighterage should fall. The answer, we think, must be found in a proper construction of the contract between them.

It cannot be fairly claimed under the evidence that the expense that would have been occasioned to the owners of the vessel, if they had removed or taken down the mast, would have been trifling or inconsiderable. There was some evidence that, in a few instances, the topmasts of vessels had been taken down in order to permit them to pass under the bridge, and that the expense in each case was small. But those were cases of vessels with wooden masts, so constructed as to permit the topmast to be lowered. The Benlarig's masts were wholly of steel, and the testimony of her master was that if it became absolutely necessary to make the vessel pass beneath some obstruction lower than the top of the masts, the masts would either have to be cut or removed wholly out of the ship. What cost would have been caused by cutting or removing the steel mast does not appear. But the courts below concurred in regarding the mutilation or destruction of the ship's masts as a serious affair.

In such a condition of affairs we think that resort to lighterage was natural and reasonable and within the obvious and fair import of the terms of the charter party. The clause, which is claimed to give the charterers or their assigns the right to appoint the dock in which to discharge cargo contains conditions that the port must be safe, and that the vessel must discharge always afloat, either at a safe port or so near the port of discharge as she can safely get. It would not be a just exercise of the right to select a dock in getting to which the vessel could not always be afloat or to which she could not safely get. A ship could not be said to be afloat, whether the obstacle encountered was a shoal or bar in the port over which she could not proceed, or a bridge under or through which she could not pass; nor could she be said to have safely reached a dock if required to mutilate her hull or her permanent masts.

Any doubt that might be felt as to this construction of the clause will be relieved by the express language of section 4: "All goods to be brought to and taken from alongside of the ship, always afloat, at the said charterers' risk and expense, who may direct the same to the most convenient anchorage; lighterage, if any, to reach the port of destination, or deliver the cargo at port of destination, remains for account of receivers, any custom of the port to the contrary notwithstanding." Here, again, is recognized the right of the ship to be "always afloat." The anchorage directed must be the "most convenient;" which must mean convenient as well for the ship as for the consignees; and, finally, if lighterage is necessary, either to reach the port or to deliver the cargo, the expense thereof is chargeable to the receivers of the goods, regardless of any local port customs.

We do not feel constrained to go into an extended consideration of the authorities cited in the briefs of counsel, but shall refer to two or three cases which, in some of their features, seem to be applicable.

The case of *The Alhambra*, (L. R. 6 P. Div. 68,) was where the charter party provided that the vessel should go "to a safe port in the United Kingdom, . . . or as near thereunto as she could safely get, and always lay and discharge afloat. . . . Lighterage, if any, always at the risk and expense of the cargo."

The charterers gave orders to the vessel to proceed to Lowestoft and there discharge the cargo. The average high water in that harbor was about sixteen feet, and average low water about eleven feet. The master objected to discharging in Lowestoft harbor, notwithstanding that the purchasers of the cargo gave him notice that they were prepared at their own expense to lighter the vessel in Lowestoft Roads sufficiently to enable her to lie always afloat in Lowestoft harbor, if necessary, should her draught of water so require. The vessel went to Harwich as the nearest safe port and there discharged the cargo. The owners of the cargo brought suit for breach of contract, and offered evidence to show that it was the custom of vessels which were too deep to enter the port of Lowestoft to discharge a portion of their cargo in the roads outside, and that it could be done with reasonable safety. The cargo owners recovered a judgment, but the Court of Appeals reversed, that court holding that Lowestoft was not a safe port for the vessel within the meaning of the charter party, and that the custom shown by the charterers was inadmissible.

This case was cited with approval by this court in *The Gazelle*, (128 U. S. 474,) where the charter party provided that the vessel should proceed from Baltimore "to a safe, direct Norwegian or Danish port, as ordered on signing bills of lading, or as near thereunto as she can safely get, and always lie and discharge afloat."

The charterers tendered to the master for signature bills of lading, ordering the vessel to the port of Aalborg, in Denmark, as the port of discharge, "to be landed at Aalborg, or as near thereto as the vessel can safely get." The master refused to sign the bills of lading for the reason that Aalborg was not a safe port. Aalborg is situated in Denmark on the Limiford inlet, about seventeen miles from its mouth. Owing to a bar at the mouth of the Inlet, there was a depth of water of only ten or eleven feet. The draft of the Gazelle loaded was about sixteen feet. The only place of anchorage for a vessel that cannot cross the bar is off the mouth of the inlet, where vessels were accustomed to discharge into lighters. Thereafter the master filed a libel for demurrage in the District Court of the United States for the District of Maryland, whose judgment, sustaining the libel and dismissing the cross-libel of the charterers, was affirmed by the Circuit Court. This court said, through Mr. Justice Gray:

"By the express terms of the charter party the charterers were bound to order the vessel 'to a safe, direct, Norwegian or Danish port, or as near thereto as she can safely get and always lie and discharge afloat.' The clear meaning of this is that she must be ordered to a port which she can safely enter with her cargo, or which, at least, has a safe anchorage outside, where she can lie and discharge afloat. (*Dahl* v. *Nelson*, L. R. 6 App. Cas. 38; *The Alhambra*, 8 P. Div. 68.) The charterers insisted upon ordering her to the port of Aalborg. The Circuit Court has found that Aalborg is in a fiord or inlet, having a bar across its mouth, which it was impossible for the Gazelle to pass, either in ballast or with cargo; and that the only anchorage outside the bar is not a reasonably safe anchorage, nor a place where it is reasonably safe for a vessel to lie and discharge."

The charterers offered evidence to show that by the custom of trade between Baltimore and the Atlantic ports and the ports of Norway and Denmark, Aalborg was recognized as being, and understood to be, a safe, direct port of Denmark, within the meaning of the charter party. In respect to which this court said: "Evidence of a custom to consider as safe a particular port, which in fact is not reasonably safe, would directly contradict the charter party, and would, therefore, be incompetent as matter of law."

In *In re an Arbitration between Goodbody and Balfour, Williamson & Co.*, (4 Com. Cas. 119,) the facts were that a cargo of wheat per the ship Vanduara had been sold in a contract containing the clause "shipped . . . per Vanduara, sailed, or about to sail, as per bills of lading dated, etc., . . . to any safe port in the United Kingdom of Great Britain and Ireland, or to Havre, or to Dunkirk, or to Antwerp, calling at Queenstown, Falmouth or Plymouth, for orders as per charter party, vessel to discharge afloat." The vendees declined to take the papers on the ground that by the bills of lading the cargo was stated to have been shipped upon the Vanduara "to discharge at a safe port in the United Kingdom, Manchester excepted," and that such bills of lading did not comply with the contract for delivery in any safe port in the United Kingdom. It was found in the special case stated for the decision of the court that "the Vanduara when loaded with the said cargo would have been unable to go up the Manchester Ship Canal to the Manchester Docks, because the heads of her lower main and mizzenmasts would have been higher than the limit fixed by the canal company's regulations for passing under the Runcorn Bridge."

The vendors argued that the addition to the bills of lading of the words, "Manchester excepted," was immaterial, inasmuch as Manchester, in any event, was not a "safe port" in the sense of the bills of lading, as the ship could not reach it without cutting off or taking down her masts; and of that opinion were the Divisional Court and the Court of Appeal, (5 Com. Cas. 59,) A. L. Smith, L. J., in the latter court saying "it is abundantly proved that Manchester, taken by itself, was not a safe port for this vessel,

because it was found as a fact . . . that it would have been necessary to dismantle the ship to enable her to get under Runcorn Bridge, which is the first bridge vessels going up the canal to Manchester have to pass." Collins, L. J., was of the same opinion. And Vaughn Williams, L. J., said: "On the findings of the last award it is perfectly plain that in a commercial sense the port of Manchester was not a safe port for the Vanduara to go to."

This case is pertinent as holding that an overhead bridge which prevents access to the place designated for the discharge quite as effectively renders it unsafe for the ship as a sandbar or other obstacle under the water.

The view of the Circuit Court of Appeals, that the construction put upon the charter party by the District Court was within its letter but not within its spirit, because "an application to novel circumstances of clauses intended for a different set of circumstances," we cannot accept. We are unable to see anything in the undisputed facts of the case that warrants any other construction of the language employed than that suggested by its ordinary meaning.

The decree of the Court of Appeals is reversed, and the decree of the District Court is affirmed with interest thereon from the time of its entry.

True copy.

Test:

Clerk Supreme Court, U. S.